No. 75-8231

IN THE

Supreme Court of the United States

October Term, 1975

RAYMOND BELCHER,

Petitioner,

v.

CASEY D. STENGEL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 16, 1975.

OPINION BELOW

The written opinion of the United States Court of Appeals for the Sixth Circuit, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit was entered on September 16, 1975, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 19 (1) (b)

of the SUPREME COURT OF THE UNITED STATES REVISED RULES.

QUESTION PRESENTED

Does the fact that an off-duty police officer, out of uniform, is required by police department regulation to carry a weapon at all times, establish that any use of that weapon against the person of another, even though the officer is engaged in private conduct at the time, to be an act "under color of law" within the meaning of 42 U.S.C. §1983?

STATUTORY PROVISION INVOLVED

The applicable statutory provision involved is 42 U.S.C. §1983:

> §1983 Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF CASE

This case arose from an incident in a public bar in Columbus, Ohio, known as Jimmie's Cafe at approximately 1:30 a.m. on March 1, 1973. Respondents' decedents Michael Noe and Robert Ruff and Respondent Casey D. Stengel,[1] three men in their early twenties, be-

[1] The following are listed as plaintiffs in the complaint: Casey D. Stengel, individually and on behalf of all persons similarly situated; Charles Ruff, Adminstrator of the Estate of Robert D. Ruff, deceased; and Timothy Noe, Adminstrator of the Estate of Michael J. D. Noe, deceased.

came involved in an altercation with other patrons of the bar including the Petitioner, Raymond Belcher. At that time Raymond Belcher was an off-duty police officer out of uniform and engaged in private social activity. During the affray Raymond Belcher discharged a firearm, striking his assailants and resulting in the deaths of Noe and Ruff and seriously injuring Stengel.

Thereafter Respondents brought this action in the United States District Court for the Southern District of Ohio, Eastern Division, under authority of 42 U.S.C. §1983 and §1985 alleging categorically that Raymond Belcher had acted in the performance of his duties and had violated their civil rights to due process and equal protection of the laws as provided in the Fourteenth Amendment of the Constitution of the United States. Jurisdiction was invoked under 28 U.S.C. §1331 and §1343. Also named as defendants were the City of Columbus, Ohio, and various police officers and supervisors who were alleged to have conspired to cover up facts of the incident.[2] The case was docketed as District Court case number 72-67.

Aside from a mere conclusory allegation that the petitioner had acted in the line of duty and the assertion that he had used a weapon which he carried while off-duty pursuant to a police department regulation, the only pertinent description of petitioner's conduct set forth in the Complaint is stated in paragraph 8 thereof as follows:

[2] The following persons were listed as defendants in their capacity as Columbus police officers and individually: Chief Dwight Joseph; Captains Francis B. Smith, Robert Taylor, and Richard O. Born; Lieut. Earl Belcher; Sgt. P. Hopkins; Officers James Newell, E. R. Woods, E. Young and John Hawk; and various John Doe officers and administrative officials of the City of Columbus. James J. Hughes, Jr. was substituted as a John Doe Defendant prior to trial and was dismissed pursuant to motion at the close of the plaintiff's case in chief.

> " * * * Defendant Raymond L. Belcher, who was out of uniform and in no way identified as a Columbus policeman, and in no way involved in the minor dispute heretofore described, intervened by attacking one of plaintiff's decedent from the rear by grabbing him around the neck from the rear; said intervention by said Raymond L. Belcher being without any notification or attempt to notify anybody in the Cafe that he was an off-duty Columbus policeman and without any attempt by said Raymond L. Belcher to make a police arrest or a citizen's arrest of any kind * * *."
>
> [Complaint, ¶8, annexed hereto; App., p. 47.]

The District Court granted a Motion to Dismiss the City of Columbus. Motions to Dismiss, as well as a Motion for Summary Judgment, were filed on behalf of all other defendants, including the petitioner, all raising the jurisdictional defense that the respondents herein had failed to properly allege that petitioner had acted under color of law and, in fact, had alleged facts which affirmatively stated that petitioner had not acted under color of law. The District Court denied these Motions. [App., pp. 36 and 41 respectively.] An Answer was filed on behalf of all defendants asserting, among other defenses, that Raymond Belcher was justified in using his weapon as a matter of self-defense and, again, asserting that the District Court lacked jurisdiction as the petitioner had not acted "under color of law" during the incident.

The case was tried to a jury with the trial commencing on June 10, 1974. At the close of the plaintiffs' case in chief, the District Court granted a Motion for a Directed Verdict on behalf of all defendants with the exception of Raymond Belcher. All defendants except Belcher were dismissed at that point and, consequently, any claims with respect to 42 U.S.C. §1985. The trial then proceeded

against Belcher alone for a jury determination of the issues under 42 U.S.C. §1983.

The evidence was uncontradicted that on the morning in question Noe, Ruff and Stengel entered Jimmie's Cafe at approximately 1:00 a.m.; ordered drinks; and that Noe and Stengel engaged in playing a "bowling" game. Shortly thereafter the Petitioner, Raymond Belcher, entered the bar in the company of a Miss Bonnie Lohman and took a seat at a booth near the door. Raymond Belcher was an off-duty Columbus police officer; he was not in uniform and was engaged in private social activity. He had in his possession a can of chemical mace and a pistol which he carried pursuant to a regulation of the Columbus police department which required off-duty officers to carry a weapon. [Joint Ex. 44(b) atached hereto, App., p. 60.]

It was further undisputed that while Raymond Belcher was seated in the booth with Bonnie Lohman and two other acquaintances, an altercation erupted between Noe and another patron, Mrs. Agnes Morgan. Blows were struck between Noe and Mrs. Morgan resulting in Mrs. Morgan's being knocked either to the floor or against a piano. Mrs. Morgan's husband, Kyle Morgan, then arose and an altercation developed between Noe and Kyle Morgan; Noe being joined by Ruff. The fight escalated and Kyle Morgan ended up on the floor with Noe standing over him.

Although the evidence was in dispute as to whether Raymond Belcher became involved in the altercation as an aggressor or as a matter of self-defense, there was absolutely no dispute, and it was set forth in the Complaint, *infra*, that at no time did he identify himself as a police officer or make any attempt to effect an arrest, either as a police officer or as a private citizen.

Belcher testified that he had observed the fight and knew it should be stopped but realized that, acting alone, he would be unable to do so. He decided to call the police which necessitated leaving the bar and proceeding to a telephone booth on the sidewalk, just outside. As he arose from his seat, he was immediately attacked by the respondent, Stengel, who had positioned himself near the door. Belcher then described the ensuing struggle through to the point where he was compelled to use his weapon as a matter of self-defense:

> "Mr. Stengel began throwing punches, attempting to strike me with his fist and attempted to throw me to the floor. I grabbed ahold of the booth and again told him to let go of me.
> "Mr. Ruff ran across the floor at that point and I was fighting both men. I was tripped or thrown on top of a small table there by the front of the bar itself, I think they are known as cabaret or cafe tables, they are very small tables, maybe two feet square.
> "My back went over this table. My head struck the juke box, and I recall being kicked for a moment after that. I was kicked several times and then there was a moment of darkness where I could neither feel nor hear anything. I don't know whether I was unconscious or apparently I was, but how long I was unconscious I have no idea. It could have been ten minutes.
> "As I looked up from the floor with my legs up over a table, I could see nothing but feet and fists. I was being kicked in the face and the head by at least two men.
> "At that time I tried to get up off the floor. I literally tried to pull myself up off the floor by using the men's clothing that were on top of me. I at one point had a man's belt in my hand and tried to drag myself up off the floor by his belt buckle, so I could get up off the floor and defend myself.

> "I was kicked first one direction, then the other direction. I continued to try to get up off the floor. I was getting tired. I was beginning to lose.
> "At that time somewhere in this struggle my teargas was kicked out of my hand. I had been spraying it, trying to spray directly into these men's faces from the floor but somewhere during the fight the tear gas was stomped from my hand.
> "As I began to realize that I wasn't gonna be able to get myself off the floor, I reached for the pistol that I carried in my waistband in my pants. At that time I was carrying a .32 Browning automatic, and the gun was not there.
> "I was still being kicked and stomped. I put my arms, my left arm over my face to shield my face from these kicks, and looked across the shiny barroom floor to see if the pistol was lying there some place.
> "The gun was not there. The thought went through my mind, oh, God, if these men, whoever they are, find that gun on the floor, they will kill me with my own weapon.
> "I felt the pistol underneath my back, still being kicked and stomped. I brought the weapon around in my right hand and shoved backwards to get these men off of me and I fired three shots straight into the ceiling, or straight into the mass of bodies that were on top of me.
> " * * * .
> Question: "Officer Belcher, as you were laying on the floor after you had come up to after you had recovered your weapon, as you removed the weapon from behind your back and pointed it upward . . . what thought was in your mind?"
> " * * * . "
> Answer: "The thought in my mind at that point was that I was going to be killed on that barroom floor if I did not use the weapon I had, I would be killed."

[T., pp. 650-652 and 661; annexed hereto as App., pp. 66 and 69.]

Belcher's testimony was corroborated by all other eye witnesses with the exception of Stengel. Although Belcher testified to firing three shots inside the bar, there is some dispute as to whether Noe was shot inside or outside. Belcher stated that he had struggled with Noe outside and struck him in the face with the gun and it went off. Noe was found outside the bar.

Stengel's testimony in regard to Raymond Belcher's involvement did not include evidence bearing on the question of whether or not Belcher acted as a private citizen or pursuant to a police duty except to say that at no time did Belcher identify himself as a police officer; nor did Stengel, Noe or Ruff understand him to be a police officer. Stengel merely portrayed Belcher as an aggressor.

Stengel testified that Belcher grabbed Robert Ruff from behind and that he (Stengel) in turn grabbed Belcher and threw him to the floor. He also stated that he did not kick Belcher but only kicked at Belcher's hand which grasped the chemical mace. Stengel stated he did not see Noe or Ruff strike Belcher; however, Stengel did state that his head was turned and he could not see Ruff or Belcher immediately prior to the shots' being fired. Stengel's description of events was in direct conflict with all other witnesses.

The only other evidence in regard to Belcher's action came in the form of later developed opinions by certain City officials and police supervisors who were not eyewitnesses to the incident, but formed the view that Belcher had acted in the line of duty. These opinions were admitted into evidence in order to support respondents' conspiracy allegations against the defendant

supervisors and officials, all of whom were dismissed at the close of respondents' case in chief. Their testimony established that Raymond Belcher had received workmen's compensation benefits for the injuries he had incurred that evening. The Chief of Police of the Columbus Police Department testified that a police officer was required to take action in any type of police or criminal activity twenty-four hours a day and would be disciplined if he did not do so. He was of the opinion that Belcher had acted under the authority of that requirement. Also, a letter to Belcher from the then Safety Director of the City of Columbus, James J. Hughes, Jr., a defendant in the case, was admitted into evidence and stated that it was the opinion of those police supervisors who comprised the Firearms Board of Inquiry that Belcher was justified in using the firearm and that his actions were in the line of duty.

At the close of all evidence the issues were submitted to the jury including the question of whether or not Belcher had acted under color of law in the incident. The jury found that Belcher had acted under color of law as implied in its verdict which awarded Stengel $800,000 in compensatory and $1,000 in punitive damages; Noe's estate $9,000 compensatory and $1,000 punitive damages; and Ruff's estate $19,000 compensatory and $1,000 punitive damages.

Belcher filed a Motion for a Judgment Notwithstanding the Verdict and/or for a New Trial again asserting that the evidence did not support the finding that he had acted under color of law. The Motion was overruled by the District Court. [Order of the District Court, annexed hereto, App., p. 43.] An appeal was taken to the Sixth Circuit specifically raising the issue as to whether the District Court erred in refusing to direct that petitioner

had not acted under color of law. The case was docketed in the Sixth Circuit as case number 75-1075. On September 16, 1975, the Sixth Circuit rendered its judgment and issued a written opinion affirming the District Court. [Judgment and Opinion of the Sixth Circuit, annexed hereto, App., pp. 21 and 22, respectively.]

The question posed herein was consistently raised by pleading and motions of the petitioner in the District Court and on appeal. The question was specifically considered and decided by the United States Court of Appeals for the Sixth Circuit.

REASONS FOR GRANTING WRIT

I. The Finding By The Sixth Circuit Court Of Appeals And The District Court That The Petitioner Had Acted Under Color Of Law, Decided An Important Federal Question In A Way So As To Conflict In Principle With The Applicable Decisions Of This Court And Lower Federal Courts.

It is petitioner's contention that the District Court lacked jurisdiction under 42 U.S.C. §1983 in that the Complaint did not properly allege, nor was the evidence sufficient to support a conclusion, that the petitioner had acted under color of law. By overruling petitioner's Motions to Dismiss and for Summary Judgment, submitting the issue to the jury, and failing to grant petitioner's Motion for a Judgment Notwithstanding the Verdict and/or a New Trial, the District Court, as affirmed by the Sixth Circuit, has decided that issue against the existing principles set forth by applicable decisions of this Court and other lower Federal Courts. The evidence did not support the jury's determination, implicit in their verdict, that the petitioner had acted under color of law.

42 U.S.C. §1983, originally known as the Ku Klux Act of April 20, 1871, was enacted after the Civil War to establish a federal cause of action to redress deprivations of federal constitutional rights which occurred as a result of state action. From the Act's inception the Supreme Court of the United States had recognized its application provides redress only for actions involving state authority and does not erect a shield against private conduct between individuals, no matter how serious or wrongful such conduct may be. This Court stated in the *Civil Rights Cases*, 109 U.S. 3, 9-12 (1883):

> "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party it is true, whether they affect his person, his property or his reputation; but if not sanctioned in some way by the State, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress."

Although this Court has applied the concept of "under color of law" to official actions which constituted a "misuse of authority," *United States v. Classic*, 313 U.S. 299, 326 (1941) and also to officials who engaged in violence under a "pretense" of law, *Screws v. United States*, 325 U.S. 91, 111 (1945) the Court has never abandoned and has continually emphasized the essential dichotomy between conduct which is wholly private and not within the scope of 42 U.S.C. §1983, and that which is done in pursuit of one's official duties. Justice Douglas pointed

out the distinction in *Screws, supra,* at 325 U.S., pp. 108 and 111:

> "We agree that when this statute is applied to the action of state officials, it should be construed so as to respect the proper balance between the States and the federal government in law enforcement. Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.
>
> " * * *.
>
> " * * *.
>
> " * * *. Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. * * *."

The principles applied in determining the question of whether "state action" is present in terms of the Fourteenth Amendment to the Constitution of the United States are easily analagous to those involved in reviewing whether action "under color of" state law exists. The terms "state action" and "under color of" state law are usually treated as one and the same although it has been recognized that when a private party acts alone, more must be shown to establish that he acts "under color of" a state statute or other authority than is needed to show his actions constitute "state action." *Adickes v. Kress & Co.*, 398 U.S. 144, 210 (1970) [Brennan, J., concurring in part]. Although this Court has not established a clear definition of what is and what is not action under

color of law, it has clearly provided that more than a trivial nexus between the entity or person on the one hand, and the state on the other, is necessary. In *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 173 (1972) this Court stated:

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in The Civil Rights Cases, supra, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' Reitman v Mulkey, 387 US 369, 380, 18 L Ed 2d 830, 838, 87 S Ct 1627 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition."

Moreover, where the allegation of state action or involvement is not obvious, the question as to its existence emits no easy answer and requires a careful sifting of the facts and circumstances of each particular case. *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722 (1961).

In major cases involving the construction to be given the term "under color of" law or state authority, this Court has made its determinations by focusing not upon whether the defendant possessed or used a physical instrument peculiar to his office, but on whether or not he was engaged in, or under the pretense of engaging

in, his official duties. *United States v. Classic, supra* [state election officials engaged in election fraud]; *Screws v. United States, supra* [state police officials using unlawful force during an arrest]; *Williams v. United States,* 341 U.S. 97 (1951) [police special deputy coercing confessions during a criminal investigation]; *Griffin v. Maryland,* 378 U.S. 130 (1964) [special deputy sheriff wrongfully arresting and instituting criminal proceedings]. In *Griffin, supra,* this Court stated the basis for its determination that the actor had committed violations of constitutional significance was that he had purported to exercise his authority as deputy sheriff, notwithstanding his combined status as an employee of a private corporation. In 378 U.S., at page 135, the Court pointed out:

> "* * *. If an individual is possessed of state authority and purports to act under that authority his action is state action. * * *."

In applying these principles, lower Federal Courts have recognized that a person does not act "under color of law" simply because he is employed by the state. *Cole v. Smith,* 344 F.2d 721 (8th Cir. 1965); *Byrne v. Kysar,* 347 F.2d 734 (7th Cir. 1965); *Duzymski v. Nosal,* 324 F.2d 924 (7th Cir. 1963). Nor does he so act purely by reason of his status as a police officer engaged in an assault as a matter of private conduct. *Nugent v. Sheppard,* 318 F. Supp. 314 (N.D., Ind., 1970); *Johnson v. Hackett,* 284 F. Supp. 933 (E.D., Penn., 1968); *Watkins v. Oakland Jockey Club,* 183 F.2d 440 (8th Cir. 1950). Rather, the proper focus must be upon the nature of the act performed and whether the officer had actually embarked upon the performance of his official duties. *Robinson v. Davis,* 447 F.2d 753 (4th Cir. 1971), *cert. denied,* 405 U.S. 979 (1972); *United States, ex rel., Smith v. Heil,* 308 F. Supp. 1063 (E.D., Penn., 1970); *Johnson v. Hackett, supra.*

Contrary to the principles set forth above, the Sixth Circuit and the District Court below, wrongfully relied

upon the fact that the petitioner resorted to the use of a weapon which he carried pursuant to police regulations, to raise the inference that the weapon was used under color of law. [Opinion of the United States Court of Appeals for the Sixth Circuit, annexed hereto, App., p. 25.] To permit the use of such a weapon alone to raise the inference of official action would truly emasculate any possibility of its use in private conduct and would irretrievably extend the scope of 42 U.S.C. §1983 beyond its intended application. In *Screws v. United States, supra,* this Court did not infer the defendants' conduct to be under color of law because they were police officers who used a blackjack, but rather because they used the blackjack in the performance of their official duties. In its opinion this Court stated in 325 U.S., at pages 108 and 109:

> "* * *. We are of the view that petitioners acted under 'color' of law in making the arrest of Robert Hall and in assaulting him. They were officers of the law who made the arrest. By their own admissions they assaulted Hall in order to protect themselves and to keep their prisoner from escaping. It was their duty under Georgia law to make the arrest effective. Hence, their conduct comes within the statute. * * *."

Contrary to the situation in *Screws, supra,* the Complaint in the instant case specifically alleges that the petitioner was off duty, out of uniform, did not attempt to arrest anyone, and did not identify himself to be a police officer. He merely became involved in an altercation.

The petitioner did not contend in his Motion to Dismiss that he was not under color of law solely because of his off-duty status, as suggested by the District Court in its order overruling the motion [App., p. 38], but petitioner contended that the proper inference to be derived from the facts pleaded was that the petitioner did not act as a police officer.

The evidence at trial from those who witnessed the incident produced nothing that would indicate that the petitioner had, at any time, embarked upon the exercise of his official duties. As was alleged in the Complaint, the witnesses did not dispute that the petitioner was off-duty and engaged in private social activity. It was further uncontradicted that he did not attempt to make an arrest or identify himself as a police officer; nor did the respondents' decendents or the respondent understand him to be a police officer.

Involvement in an altercation in and of itself, even where the person is a police officer, does not raise the inference that his action is under color or "pretense" of law. *Johnson v. Hackett, supra; Smith v. Heil, supra.* Moreover, the petitioner's stated intention was to proceed to a telephone in order to call the police which is no more than the expected act of any private citizen under the circumstances.

In its opinion, *infra* [annexed hereto, App., p. 26], the Sixth Circuit commented that the petitioner used poor judgment in failing to identify himself as a police officer which that Court believed would have easily solved matters. The petitioner suggests that the more logical inference to be drawn from such a failure is the fact the petitioner did indeed not intend to act as a police officer, but rather as a private citizen. In any event, where there is an absence of any evidence to indicate that the petitioner had engaged in, or attempted to engage in, the performance of his official duties, to find his involvement in an altercation to be activity under color of law is contrary to the stated principles governing 42 U.S.C. §1983.

In addition to its focus upon the weapon used, it is clear from the opinion of the Sixth Circuit that it placed

considerable reliance upon the opinions of certain city officials who had not witnessed the event but offered testimony as to their later developed beliefs that the petitioner had acted in the line of duty and was covered by the Workmen's Compensation Law of the State of Ohio. [Opinion of the United States Court of Appeals for the Sixth Circuit, annexed hereto, App., pp. 25.] It is petitioner's contention that the lower Courts wrongly relied upon such evidence which was offered during the conspiracy portion of the trial and prior to the dismissal of all other defendants. The question of whether the petitioner acted under color of law is a question of law for the determination of the Federal Court based upon a careful examination of the manner and character of his actions at the time and place of the event. *Robinson v. Davis, supra.* Opinions offered by persons who did not witness petitioner's actions are not relevant to the determination of the federal issue in question and should not be permitted to influence or displace a Federal Court's judgment as to that jurisdictional issue.

Had the United States Court of Appeals for the Sixth Circuit and the District Court below reviewed the properly relevant evidence and allegations pertaining to the federal question presented under 42 U.S.C. §1983, using the stated principles set forth by this Court and other lower Federal Courts, they would have been compelled to determine that the petitioner had not acted under color of law.

II. The Decisions Below Raise A Question Of Federal Statutory Interpretation Of Great Importance And Should Be Decided By This Court.

Aside from the obvious importance which the instant case reflects for the individual litigants herein by the fact that a single police officer has incurred a federal

damage judgment in excess of $830,000 for conduct engaged in while off-duty, the case presents important statutory considerations in a swiftly growing area of federal litigation. The facts presented here are indicative of the myriad of new situations now brought to lower Federal Courts for determinations under 42 U.S.C. §1983 and related sections. More definitive guidelines are required for the applicability of these sections than currently exist.

Although the petitioner contends that the decisions of the District Court and the Sixth Circuit below conflict with the past interpretations given by this Court in its considerations of the phrase "under color of law," a clear definition of those words has yet to be established. In *Monroe v. Pape*, 365 U.S. 167 (1961); *Screws v. United States*, 325 U.S. 91 (1945); and *United States v. Classic*, 313 U.S. 299 (1941), this Court was not confronted with allegations of such a tenuous attachment to official action as suggested here by the mere existence and use of a weapon authorized by the actor's office. Rather, those cases involved situations where the defendants had clearly embarked upon the pursuit of their official duties and, while performing those duties, committed wrongful and unauthorized acts.

Although as recognized in *Monroe v. Pape, supra*, the words "under color of" law or state authority may not lend themselves to precision in the law, the danger of a continuing uncertainty in the application of that phrase is evidenced by the opinions of the District Court and the Sixth Circuit in the instant case which broaden the scope of 42 U.S.C. §1983 and, at the very least, create implications for its unwarranted extension. To focus merely upon official nature of the weapon used to alone raise the inference that it was used "under color of law"

or other authority would easily extend the statute's application to encompass any accidental discharge of the weapon by an off-duty officer or even its use in purely criminal conduct which sets in total opposition to the user's authority or duty. Such an interpretation would virtually emasculate the well recognized exclusion of private conduct set forth in the *Civil Rights Cases*, 109 U.S. 3 (1883) from within the ambit of the Act.

Furthermore, the suggested extension of the "under color of law" doctrine by the lower courts in this case would be cause for great concern in the administration of police departments and law enforcement agencies throughout the United States. Thousands of police officers in this country carry weapons while off-duty pursuant to regulations of their respective agencies. The purpose of these regulations is to provide these agencies with the capability of obtaining an instant response when emergencies require supervisors to call off-duty personnel to an on-duty status. An added purpose is to provide off-duty officers with a means of self-defense against individuals who may wish them harm by reason of the special nature of their employment.

If a ready response to criminal emergencies is to be maintained by local police agencies and if officers are going to continue to have an adequate means of personal self-defense, then it is vitally necessary for this Court to establish guidelines containing a modicum of specificity which would indicate just when the use of these weapons would be considered to be "under color of law" and which would insure that the private use of these weapons would not be brought within the reaches of 42 U.S.C. §1983 and thereby subject the officer and his supervisors to federal civil damage suits, as has occurred in this case.

The decisions below reflect an unwarranted extension

of 42 U.S.C. §1983 into an area not recognized by this Court and profoundly affect the administration of local police agencies throughout the United States.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-1075

[Caption omitted in printing]
filed September 16, 1975

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiffs-Appellees recover from Defendants-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

Entered by Order of the Court.
JOHN P. HELMAN, *Clerk*

Issued as Mandate: October 15, 1975

COSTS: None
Filing fee ..... $_____
Printing ..... $_____

Total $_____

No. 75-1075

United States Court of Appeals

FOR THE SIXTH CIRCUIT

[Caption omitted in printing]

Decided and Filed September 16, 1975.

Before: PHILLIPS, Chief Judge, WEICK and PECK, Circuit Judges.

WEICK, Circuit Judge. The suit in the court below arose out of an incident in Jimmy's Cafe in Columbus, Ohio at about 1:30 A.M., on March 1, 1971 in which Raymond L. Belcher, an off-duty policeman, shot and killed two young men and paralyzed a third while acting under color of law.

The suit was brought under authority of 42 U.S.C. §§ 1983 and 1985 for violation of the civil rights of the plaintiffs to due process and equal protection of the laws: *Cf. Smartt v. Lusk*, 373 F. Supp. 102 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 1244 (6th Cir. 1974).

The plaintiffs in the case were Casey D. Stengel, a 22 year old man who was shot in the back, the bullet penetrating his spine and paralyzing him, and the administrators of the estates of the other two deceased men. The defendants were Officer Raymond L. Belcher, the City of Columbus, and a number of other police officers who were alleged to have conspired to cover up the facts concerning the shootings.

The District Court granted the motion to dismiss of the City of Columbus. The case was tried to a jury. At

the close of the plaintiffs' case in chief the District Court granted the motions of the defendants, the police officers, other than Belcher, for a directed verdict and dismissed them from the case. The case then proceeded against the remaining defendant, Raymond L. Belcher, resulting in verdicts against him in favor of all of the plaintiffs.

The jury awarded Noe's estate $9,000 in compensatory damages and $1,000 in punitive damages, Ruff's estate $19,000 in compensatory damages and $1,000 in punitive damages, and Stengel $800,000 in compensatory damages and $1,000 in punitive damages. Belcher has appealed. We affirm.

Briefly, the evidence disclosed that at approximately 1:00 A.M., on March 1, 1971, Stengel, Ruff and Noe entered Jimmy's Cafe. Stengel, Ruff and Noe were in their early twenties. They recognized one of the other customers, Mrs. Agnes Morgan. She introduced them to her husband, Kyle, and Stengel and Noe decided to play a game of "bowling" with Mr. and Mrs. Morgan for a beer. After the game, Stengel took a seat at the bar. A dispute developed between Noe and the Morgans. Mrs. Morgan slapped Noe in the face and Noe slapped her back. The dispute escalated and the evidence as to what happened is sharply in conflict but it is undisputed that none of the young men were armed.

Belcher, who, as before noted, was off duty and out of uniform, had previously entered the bar with his girlfriend and they had seated themselves with another couple in one of the booths. Belcher was equipped with a can of mace and a 32 caliber revolver which police regulations required him to carry at all times. Without identifying himself as a police officer at any time, Belcher involved himself in the altercation. Belcher claimed that he was attacked by Stengel, Ruff and Noe. His girlfriend

and the other couple in the booth corroborated his story. Stengel testified that Belcher was holding Ruff from behind, at which point Stengel grabbed Belcher and pushed him down to the floor. On the way down, Belcher was spraying Stengel in the face with the mace.

Belcher and other witnesses testified that Stengel, Ruff and Noe were "stomping" him. Stengel testified that he only kicked at the chemical mace in Belcher's hand when Belcher was on the floor and that Ruff and Noe were not doing anything to Belcher. Belcher drew his gun and shot Ruff in the chest, the bullet passing through his heart, and he shot Stengel in the back. The bullet entered Stengel's spinal canal and he was immediately paralyzed. There is some dispute whether Noe was shot inside or outside the bar. He was found on the sidewalk outside the cafe where Belcher had chased him. He was shot in the chest. Belcher testified that he grappled with Noe outside of the bar and struck him in the face with his gun and it went off.

A police laboratory report disclosed that Stengel was shot from a distance of 6 to 10 inches, Ruff from a distance of 12 to 20 inches and Noe from a distance of 6 inches.

Belcher testified that in the cafe he fired his pistol three times in the air.

Belcher contends that there is insufficient evidence to support the jury's finding, implicit in its verdict, that Belcher was acting under color of state law at the time of the incident in Jimmy's Cafe. He contends that the evidence shows that he was engaged in private social activity, was out of uniform and off duty and never identified himself as a police officer. In other words, he contends that his actions were taken as a private citizen. Acts of police officers in the ambit of their personal,

private pursuits fall outside of 42 U.S.C. §1983. *Monroe v. Pape*, 365 U.S. 167, 185 (1961); *Screws v. United States*, 325 U.S. 91, 111 (1945).

However, [a]cts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." *Screws, supra*, at 111. The fact that a police officer is on or off duty, or in or out of uniform is not controlling. "It is the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law." *Johnson v. Hackett*, 284 F. Supp. 933, 937 (E.D. Pa. 1968). See *Robinson v. Davis*, 447 F.2d 753 (4th Cir. 1971), *cert. denied* 405 U.S. 979 (1972).

The chemical mace which Belcher sprayed was issued to him by the Columbus police department. Belcher carried his pistol pursuant to a regulation of the police department which required off-duty officers to carry pistols as well as mace at all times.

Although Belcher testified that he was attacked while trying to go outside of the bar to telephone police,[1] Stengel testified that Belcher grabbed Robert Ruff from behind, around the neck and waist, after the dispute between Ruff, Noe and the Morgans had begun. There was other evidence which permitted an inference that Belcher, although he overstepped the bounds, intervened in the dispute pursuant to a duty imposed by police department regulations.

Dwight Joseph, who was the chief of police at the time of the incident, testified that a police officer was required to take action "in any type of police or criminal activity 24 hours a day." Chief Joseph further testified:

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[1] Belcher was impeached on this point by his prior inconsistent statement.

A. They would be subject to discipline if they didn't take action.

. . . .

Q. Did Raymond Belcher act under the authority of those regulations in the incident that's here involved?

A. Yes, sir.

The record contains a letter dated April 8, 1971 written to Officer Belcher by the Director of the Department of Public Safety, Mr. James J. Hughes,[2] which closed the inquiry of the Police Firearms Board of Inquiry by exonerating Belcher. In relevant part, the letter states: "The inquiry is hereby closed with a specific finding that your actions were in line of duty . . . ." Officer Belcher also received workmen's compensation on the ground that he was "in line of duty under circumstances relating to police duties."

The plaintiffs-appellees contend that the District Court should have decided, as a matter of law, that Officer Belcher was acting at the time under color of state law, in view of an admission by his counsel in open court to that effect and the undisputed testimony. We agree. Out of an abundance of caution, the District Court submitted this factual issue to the jury for its determination. We see no objection to this procedure and hold that the evidence abundantly supports the jury's verdict.

It is not understandable to us why Officer Belcher, instead of entering into the affray, grabbing one of the participants from behind and spraying mace, did not announce to the participants that he was a police officer and demand that they desist in their altercation. This

[2] Mr. Hughes as City Attorney acted as counsel for Belcher at the trial.

might have prevented injury to anyone. It appears to us that Belcher, as a police officer, used poor judgment.

Belcher's next contention is that the District Court erred in excluding evidence proferred of allegedly similar incidents involving Ruff, Noe and Stengel. Among other purposes, he claims that the evidence was admissible on the issue of who was the aggressor in the incident involved in the case at bar.[3] Incidentally, the Court also excluded evidence of similar incidents proffered by plaintiffs involving Belcher.

Belcher sought to introduce testimony by several people concerning four previous incidents in which Ruff, Noe and Stengel allegedly entered bars and caused trouble. One of the incidents allegedly happened earlier on the night of February 28, 1971, the night on which the three men were shot.

The proffer indicated that most of the witnesses would testify that in the other bars the trio was loud, abusive, profane, and that they attempted to cause trouble.

In addition, assuming that Belcher was acting under color of state law, the primary issue was whether Officer Belcher used excessive force, and not who was the first aggressor.

The appellees indicated that the proffered testimony would have been controverted, thus, introducing disputes over collateral issues, with the attendant possibility of confusion of issues and the certainty that the trial would be prolonged. The proffered evidence in no event would have been admissible on the issue of self defense because there is no proof that at the time of the shootings Belcher had any knowledge of the proffered incidents.

[3] Belcher contends that the evidence is also admissible to prove a number of other matters, including intent, knowledge, habit, etc., none of which are shown to be material to the case. The same could be said about Belcher's conduct on other occasions.

Finally, we observe that the proffered circumstantial evidence would have been cumulative, since Belcher's version of the incident is supported by direct evidence, the testimony of his girlfriend and the other couple who had been with them in the booth, although the jury chose not to believe the testimony.

Even when evidence is otherwise relevant and admissible, under the circumstances of this case the trial court had discretion to exclude it. The trial court has the duty to weigh the probative value of the evidence against the possibility of prejudice, confusion of issues, and waste of time, especially where the case is tried before a jury. *Smith* v. *Spina*, 477 F.2d 1140, 1146 (3rd Cir. 1973); *Olin-Mathieson Chem. Corp.* v. *Allis-Chalmers Mfg. Co.*, 438 F.2d 833, 838 (6th Cir. 1971); *In re Compudyne Corp.*, 255 F.Supp. 1004, 1008 (E.D. Pa. 1966).

Rule 403 of the new Federal Rules of Evidence, which would be applicable if a new trial were ordered, is described in the Advisory Committee's Note as finding "ample support in the authorities." The rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time or needless presentation of cumulative evidence.

In light of the marginal probative value of some of the proffered testimony, its cumulative nature, its tendency to introduce collateral issues and prolong the trial, the District Court did not abuse its discretion in excluding the testimony proffered by Belcher. We note, parenthetically, that the District Court applied its discretion evenhandedly in this regard.

As before stated, the court also excluded evidence

which the plaintiffs sought to introduce which involved 46 "Use of Force" reports prepared and filed by Belcher with the police department, and an incident which occurred at Jimmy's Cafe on December 14, 1971, in which he struck another man in the presence of his girlfriend.

Belcher further contends that the District Court erred in admitting Stengel's medical records without supporting expert testimony concerning the cause, nature, extent and duration of his injuries and the reasonableness and necessity of the medical bills, which were admitted as part of the medical records.

The medical records in question are Stengel's medical records from Riverside Hospital, where he was admitted after the shooting and subsequently, and from the Ohio State University Hospitals, where he was admitted for rehabilitation and for treatment of medical problems which developed as the result of his paraplegia. Without going into detail, these records indicate that he has had no meaningful return of neurological function in the affected parts of his body, and they also indicate resulting medical problems, including treatment of decubitus ulcers, a suprapubic cystostomy, and an osteotomy of the right proximal femur with a resection of myostic bone block.

There is no question concerning the duration of Stengel's injuries. First, Clifford Stengel, Casey's father, testified without objection that Dr. Rossel of Riverside Hospital had told him that there was practically no chance that Casey would walk again. Second, the final pretrial order stated as an uncontroverted fact established by admission or stipulation that Casey Stengel's injuries were permanent. (Uncontroverted Fact 4). At trial, Stengel's counsel stated to the jury, without objection by the defense, that the parties had stipulated that

the injuries were permanent. The parties also stipulated the mortality tables.

The medical records are Joint Exhibits 68 and 69. At trial, these records were identified by their respective custodians. When the plaintiffs moved admission of the medical records, the defense objected but not on the ground that they had not been properly identified specifically, stating:

> MR. HUGHES: Joint Exhibits 68 and 69, Your Honor, our objection to them is there has been no medical testimony as to cause of action, that they are — there are matters contained in there that are not connected.

The Court admitted the records over the objection.

The Court instructed the jury concerning past and future medical expenses. As Fed. R. Civ. Pro. 51 requires, the Court afforded counsel an opportunity to object to the charge out of the presence of the jury. Defense counsel stated that he had no objection to the entire charge.

Under Ohio law, a physician's diagnosis made in the course of his patient's treatment and contained in a hospital record is admissible as part of a business record. Ohio Revised Code § 2317.40; *Weis* v. *Weis*, 147 Ohio St. 416, 425 (1947). Because the diagnoses contained in the hospital records and the notations of treatments were admissible under Ohio law, they are likewise admissible in a federal court sitting in Ohio. Fed. R. Civ. Pro. 43(a).

Therefore, it is unnecessary to determine whether the hospital records, including diagnoses, would be admissible under the provisions of 28 U.S.C. § 1732(a), as that section read at the time of trial. *Cf. Willmore* v. *Hertz Corp.*, 437 F.2d 357, 359 (6th Cir. 1971). See Rule 803(6) of the Federal Rules of Evidence.

Assuming that a proper foundation is laid, diagnoses

contained in hospital records of a patient's treatment are admissible under the Ohio business records exception to the hearsay rule. The defendant-appellant objected on the specific ground that the plaintiffs had offered no expert medical testimony. The expert medical testimony was contained in the hospital records. Apparently, the defendant believed that diagnoses contained in medical records must be supported by expert testimony at trial. The business records exception contains no such requirement. See 16 O.Jur. 2d Rev. "Damages" § 55.

The specific objection made is effective only to the extent of the grounds specified in the objection. 1 *Wigmore on Evidence* § 18; *Williams* v. *Union Pacific R.R.*, 286 F.2d 50, 55 (9th Cir. 1960); *Norwood* v. *Great American Indemnity Co.*, 146 F.2d 797, 800 (3rd Cir. 1944). The grounds specified are, as we have held, untenable.

With respect to past and future medical expenses, the defendant failed to object to the Court's charge to the jury, although he was afforded an opportunity to object if he wanted to.

Fed. R. Civ. Pro. 51 reads, in part:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Having declined to object to the Court's charge concerning past and future medical expenses, Belcher may not now raise the contention that the evidence was insufficient to submit the question of such damages to the jury.

Certainly, Belcher's contention does not fall within the limited exception to the requirement of an objection recognized in *Batesole* v. *Stratford*, 505 F.2d 804, 808

(6th Cir. 1974). The issue does not go to the heart of the case, nor it is a vital one which is decisive of the parties' rights.

Belcher next contends that the jury's verdict is not supported by the evidence; that the plaintiffs did not pray for punitive damages and that the evidence does not support an award of punitive damages; that the amounts of damages are grossly excessive; and that the court erred in failing to instruct the jury to disregard certain evidence.

Concerning liability, the verdict is supported by the overwhelming evidence. The minor injuries consisting of bruises and cuts received by Belcher on his face which did not require hospitalization do not support his claim of self defense or justify his use of excessive force in killing two young men and permanently maiming a third. Concerning punitive damages, plaintiffs' counsel moved orally to amend the complaint to ask for punitive damages. Fed. R. Civ. Pro. 15(b). At with other issues which Belcher has raised, he did not object to the Court's instruction concerning punitive damages. Our observations concerning this failure, *supra*, are likewise applicable here. Stengel's testimony, in conjunction with the fact that the bullets were fired from close range without warning into vital parts of the victims' bodies, supports the award of punitive damages.[4]

Belcher further contends that the damages recovered by the plaintiffs are not supported by the evidence and are grossly excessive. The District Court rejected this contention in denying Belcher's motion for a new trial.

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[4] Punitive damages may be recovered in actions under 42 U.S.C. § 1983. *McDaniel v. Carroll*, 457 F.2d 968 (6th Cir. 1972), *cert. denied*, 409 U.S. 1106 (1973); *Basista v. Weir*, 340 F.2d 74, 87 (3rd Cir. 1965).

In the absence of a showing of bias, passion, or corruption on the part of the jury, excessiveness of the jury's verdict is a question primarily addressed to the trial court's discretion. On appeal, this court considers only whether the trial court has abused its discretion. *Shepherd* v. *Puzankas*, 355 F.2d 863, 865 (6th Cir. 1966); *Kroger Co.* v. *Rawlings*, 251 F.2d 943, 945 (6th Cir. 1958).

It is undisputed that Noe and Ruff lived for approximately 45 minutes after they were shot. (Document 58, page 6 of record on appeal, which is Belcher's motion for a new trial uses this figure). There is evidence that both were conscious during this period. Ruff was survived by his widow. He was employed as a cab driver. His claims involved both wrongful death and surivorship. In our opinion, the trial court did not abuse its discretion in deciding that these damages were not grossly excessive.

Understandably, Belcher's attention is directed primarily to Stengel's recovery of $800,000 in compensatory damages. In our opinion, these damages are also supported by substantial evidence, and the District Court did not abuse its discretion in holding that the damages were not grossly excessive.

Stengel was 22 years old when he was shot. The parties stipulated that his life expectancy at that time was 40 years. He was a veteran and had been accepted by Ohio State University for enrollment during the Spring quarter of 1971. He had previously been employed as a mail clerk with the U.S. Post Office. Stengel attempted to continue his education after he was released from the hospital by attending Franklin University, but was unable to do so because of decubitus ulcers which developed as the result of sitting.

Stengel testified concerning the care that he was then

receiving from his housekeeper. and his father, Clifford Stengel, testified concerning the assistance which Casey required in everyday matters, such as putting on some of his clothes, or getting to the bathroom and back.

The testimony concerning his pain from the time of the shooting was extensive. He testified to intense pain as he lay in the hospital immediately after he was shot. He testified that his pain continued, due to complications, while he was in the hospital and after he was released from the hospital. Pain from various conditions resulting from his immobility continued at least until the time of trial and the jury could infer that he would continue to have such pain in the future.

Stengel's injuries were stipulated to be permanent. It was no doubt obvious to the jury from the testimony and from seeing him, that he had lost the ability to walk, to eliminate normally, and, probably, to enjoy a normal married life. He testified that his problems were at least partly responsible for his separation and subsequent divorce from his wife. Such matters, the jury could infer, would result in future mental anguish.

Although Belcher contends that the verdict is the result of bias, prejudice or passion, we have examined the record and are unable to find any such evidence.

Finally, Belcher contends that the District Court erred in failing to give a requested instruction which instructed the jury to disregard certain matters both as to liability and damages. Belcher claims that the testimony to which the instruction refers was admitted only in support of the conspiracy claim, which the Court dismissed after the close of plaintiffs' case.

Belcher was not entitled to the requested instruction, since it would have withdrawn at least part of Stengel's pain and suffering while awaiting treatment at the hospi-

tal. The Court properly instructed the jury that Stengel could recover damages only for injury suffered as a proximate result of the shooting, and for future damages which were reasonably certain to occur. Belcher did not object to the charge as given and, for the reasons noted earlier, he cannot raise this issue on appeal. Fed. R. Civ. Pro. 51.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action 72-67

[Caption omitted in printing]
filed March 19, 1973

OPINION AND ORDER

This matter is before the Court on defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted and for lack of jurisdiction over the subject matter.

The twenty-five defendants in this action have filed five separate but related motions.

1. A motion by defendant Raymond Belcher to dismiss the complaint as to him because the Court lacks jurisdiction over the subject matter and because the complaint fails to state a claim against him upon which relief can be granted.
2. A motion by defendant Dwight Joseph to dismiss the action as to him because the Court lacks jurisdiction over the subject matter and because the complaint fails to state a claim against him upon which relief can be granted.
3. A motion by defendant City of Columbus to dismiss the action against it because the Court lacks jurisdiction over the subject matter and because the complaint fails to state a claim against it upon which relief can be granted.
4. A motion on behalf of the twelve John Doe defendants to dismiss the action as to them because the Court lacks jurisdiction over the subject matter and over the person and because the complaint fails to state a claim against them upon which relief can be granted.

5. A motion on behalf of the ten remaining defendants to dismiss the action as to them because the Court lacks jurisdiction over the subject matter and because the complaint fails to state a claim upon which relief can be granted.

This action was commenced under the provisions of Title 42, United States Code, Sections 1983 and 1985. Jurisdiction of the Court is invoked under Title 42, United States Code, Sections 1331 and 1343.

Plaintiff Stengel contends that he was assaulted by defendant Raymond Belcher during a barroom altercation and, as a result of that assault, was paralyzed. The two other plaintiffs were killed. Plaintiffs contend that the remaining defendants conspired to cover up the incident. Defendant Raymond Belcher is a police officer for the City of Columbus. However, he was not officially on duty at the time the assault occurred. The remaining defendants are police officers and supervisory personnel of the Columbus Police Department.

Each of the defendants' motions will be considered separately.

1.

Section 1983 provides that any person who while acting under the color of state law deprives another of any right, privilege or immunity secured by the Constitution or laws of the United States shall be liable to the injured party. Therefore, plaintiffs must both allege and prove that defendants were acting under color of state law. Defendant Raymond Belcher contends that the complaint should be dismissed as to him because he was not acting under color of state law at the time of the assault.

The Court has carefully examined the allegations in the complaint. The complaint does allege that defendant Raymond Belcher was acting under color of state law.

Defendant Belcher contends that since he was not technically on duty when the assault occurred he could not have been acting under the color of state law. However, this is not necessarily true. *See Johnson* v. *Hackett*, 284 F.Supp. 933 (E.D. Pa. 1968).

Whether or not plaintiff will be able to prove that defendant Raymond Belcher was acting under color of state law is not at issue here. Rather, the motions filed on behalf of this defendant attack the sufficiency of the allegations in the complaint. Viewing the allegations in the complaint in the light most favorable to plaintiff, the Court determines that they are sufficient to withstand a motion to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.

WHEREUPON, the Court determines that this motion is without merit and it is therefore DENIED.

2.

Defendant Joseph contends that this Court does not have jurisdiction over the subject matter because defendant Raymond Belcher was not acting under the color of state law. However, as noted above, this argument is without merit. Defendant Joseph also contends that the complaint fails to state a claim upon which relief can be granted against him because he cannot be held liable under the theory of respondeat superior in a § 1983 action. There are a number of cases which have adopted this position. *See, e.g., Jordan* v. *Kelly*, 223 F.Supp. 731 (W.D. Mo. 1963). However, the complaint in this action also alleges that defendant Joseph participated in the conspiracy to cover up this incident. Therefore, the Court believes that he should not be dismissed as a party to this action.

WHEREUPON, the Court determines that the motion is without merit and is therefore DENIED.

3.

The City of Columbus contends that since it is not a "person" within the meaning of Section 1983, then it cannot be made a party to this action. In *Monroe* v. *Pape*, 365 U.S. 167 (1961), the Supreme Court held that in an action for money damages a municipal corporation is not a "person" within the meaning of Section 1983. To this extent, the motion by the City of Columbus is meritorious. However, plaintiffs also seek injunctive relief against the City of Columbus. Plaintiffs seek to enjoin enforcement of a regulation of the Columbus Police Department which requires all off duty officers to carry firearms. This Court does not interpret *Monroe* v. *Pape*, *supra*, to bar an action against a city for injunctive relief. *See* C. Antieau, Federal Civil Rights Acts § 37 (1971).

WHEREUPON, the Court determines that the motion is without merit and it is therefore DENIED.

4.

The fourth defense motion is a motion on behalf of the twelve John Doe defendants to dismiss the complaint as to them. The complaint alleges that these defendants participated in the conspiracy to cover up the incident. For the reasons stated elsewhere in this opinion, the Court believes that the allegations in the complaint are sufficient to withstand a motion to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted. However, these defendants also contend that the complaint should be dismissed as to them for insufficiency of service of process.

The Court notes that these defendants have not been served with process because their real identity has not yet been determined. Therefore, the Court will reserve a ruling on this motion until after the completion of discovery.

5.

The last defense motion to dismiss which was submitted by the ten remaining defendants who allegedly participated in the conspiracy to cover up the incident asserts that this Court lacks jurisdiction over the subject matter because defendant Raymond Belcher was not acting under the color of state law at the time of the assault. However, as noted above, this argument is without merit. Defendants further contend that the complaint fails to allege sufficient facts to establish a conspiracy under §1983. The complaint alleges that these defendants attempted to whitewash the incident by filing unfounded charges against plaintiff Stengel, intimidating witnesses, failing to immediately examine defendant Raymond Belcher for intoxication, releasing inaccurate stories to the news media and other actions designed to cover up the incident. While these activities would not be sufficient to sustain a claim for relief under 42 U.S.C. §1985 in that plaintiff has not alleged that the discrimination was class based, *see Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971), the Court does believe that the allegations in the complaint state a claim for relief under §1983. *See Mizell* v. *North Broward Hospital District*, 427 F.2d 468 (5th Cir. 1970).

WHEREFORE, the Court determines that this motion is without merit and it is therefore DENIED.

JOSEPH P. KINNEARY, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action 72-67

[Caption omitted in printing]
filed March 19, 1973

OPINION AND ORDER

This matter is before the Court on plaintiffs' motion for summary judgment under the provisions of Rule 56 of the Federal Rules of Civil Procedure and defendants' motion to strike plaintiffs' summary judgment motion under the provisions of Rule 12(f) of the Federal Rules of Civil Procedure.

Plaintiffs in this action contend that they are entitled to summary judgment on the issue of whether the defendants were acting under color of state law. Rule 56 provides that summary judgment is appropriate where there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. In this case defendants have denied that the principal defendant in this action was acting under color of state law. Therefore, a contested issue of fact exists and summary judgment is clearly inappropriate. *Rogers* v. *Peabody Coal Co.*, 342 F.2d 749 (6th Cir. 1965); *Bailey* v. *American Tobacco Company*, 462 F.2d 160 (6th Cir. 1972).

Defendants' motion to strike plaintiffs' motion for summary judgment will also be denied. However, the Court takes this opportunity to remind counsel that they are to act in a professional manner in all matters before this Court. The Court will not tolerate the emotional attacks which have characterized this action to date.

WHEREUPON, the Court determines that the motions are without merit and they are therefore DENIED.

JOSEPH P. KINNEARY, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action 72-67

[Caption omitted in printing]
filed September 11, 1974

ORDER

This matter is before the Court on plaintiffs' motion for substitution of party plaintiff and on defendant's post-trial motions. Defendant has filed no memorandum contra to plaintiffs' motion. Plaintiffs have filed memoranda contra to defendant's motion, and defendant has filed a reply to plaintiffs' memoranda.

Plaintiff moves to substitute Albert J. Leshy as administrator for the estate of Michael J. D. Noe. The motion is filed pursuant to Rule 25, Fed. R. Civ. Proc. Leshy would be substituted for Timothy Noe, who has been named as administrator of Michael J. D. Noe's estate, but who died since the commencement of the action. Timothy Noe's death was suggested on the record of the case at trial which commenced on June 10, 1974. Plaintiffs' motion was filed August 12, 1974. It was timely filed.

Rule 14(b), Rules of the United States District Court, Southern District of Ohio, states that:

> Upon the filing of the motion, memorandum and certificate, any memorandum contra shall be filed within twenty (20) days from the date of filing. Failure to file a memorandum contra may be cause for the Court to grant the motion as filed.

Plaintiff's motion was filed on August 12, 1974. More

than twenty days has elapsed since the filing of the motion.

Plaintiffs' motion is GRANTED.

Defendant timely moves for a judgment notwithstanding the verdict. The motion is filed pursuant to Rule 50(b), Fed. R. Civ. Proc. He also moves for a new trial or an altering or amending of the judgment. These motions are filed pursuant to Rules 59(a) and (e), Fed. R. Civ. Proc. Both of the Rule 59 motions have been timely filed. Because defendant moved for a directed verdict at the close of all the evidence, his motion is properly taken.

Defendant's motions are DENIED.

WHEREUPON, the Court determines the plaintiffs' motion to substitute a party plaintiff to be meritorious and it is therefore GRANTED, and defendant's motions for a judgment notwithstanding the verdict, for a new trial and for an altering or amending of the judgment to be without merit and they are therefore DENIED.

JOSEPH P. KINNEARY, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action 72-67

[Caption omitted in printing]
filed February 28, 1972

COMPLAINT

1. Jurisdiction of this Court is invoked under the Fourteenth Amendment, United States Constitution and Title 28, United States Code Sections 1331 and 1343 and Title 42, United States Code Sections 1983 and 1985.

2. The matter in controversy exceeds the sum or value of Ten Thousand Dollars, exclusive of interest and costs.

FIRST CLAIM

3. During all times herein mentioned, Plaintiff, Casey D. Stengel and Plaintiffs' decedents, Robert D. Ruff and Michael J. D. Noe, were citizens of the United States residing in the City of Columbus, County of Franklin, and State of Ohio, and Plaintiff, Casey D. Stengel, is of full age. Plaintiff, Charles Ruff, is the duly qualified and acting Administrator of the Estate of Robert D. Ruff, and brings this action on behalf of the wife and the next of kin of said decedent who would be entitled to inherit under the Ohio statutes of descent and distribution. Plaintiff, Timothy Noe, is the duly qualified and acting Administrator of the Estate of Michael J. D. Noe, and brings this action on behalf of the next of kin of said decedent, Michael J. D. Noe, who would be entitled to inherit from Michael J. D. Noe, pursuant to the Ohio statutes of descent and distribution.

4. During all times mentioned herein, defendant, Dwight Joseph, was the duly appointed, qualified and presently acting Chief of Police in charge of the police force of the City of Columbus, Ohio.

5. During all times mentioned herein, defendants, Raymond L. Belcher, John Hawk, Francis B. Smith, Robert Taylor, Richard O. Born, Earl Belcher, Detective Sgt. P. Hopkins, James Newell, E. R. Woods, E. Young, M. Hardin and John Doe defendants, one through twelve, were duly appointed, qualified and acting police officers or administrative officials of the Police Department of the City of Columbus, a municipal corporation of the State of Ohio, and were agents of the said City acting or purporting to act in the course of their employment and engaged or purported to be engaged in the performance of their duties as police officers or administrative officials of said City and acting pursuant to orders, directives and regulations of said Police Department and orders and directives from defendant, Dwight Joseph, Police Chief of the City of Columbus, and all the conduct of all the defendants in connection with facts alleged in this Complaint has been ratified and condoned by defendant, The City of Columbus, through acts and conduct of its Chief Police Officer, Dwight Joseph and other duly authorized supervisory personnel. Defendant Police Lieutenant Earl Belcher is believed to be a blood relative of defendant, Raymond L. Belcher.

6. During all times herein mentioned the defendants and each of them were persons acting under color of the statutes, ordinances, regulations, customs and usages of the State of Ohio, County of Franklin, and The City of Columbus.

7. The City of Columbus at all times herein mentioned was the employer of the other defendants and

each of them. Said City at all times herein mentioned provided the individual defendants and each of them with an official badge and identification card which designed and described its bearer as Police Chief or officer of said City's Department of Police. During all times herein mentioned The City of Columbus by police regulation ordered off-duty policemen to carry arms at all times based on the theory that said police officers and police chief are on duty 24 hours of each day.

8. On or about March 1st, 1971, at approximately 1:30 a. m., Plaintiff, Casey D. Stengel, in company with Robert D. Ruff and Michael J. D. Noe who are the other plaintiffs' decedents, were all patrons at a tavern known as Jimmie's Cafe, 2338 Summit Street in the City of Columbus, Ohio, when an argument developed between Michael J. D. Noe, one of the other plaintiffs' decedent, and two other patrons at the Cafe, Cal Morgan and Agnes Morgan, husband and wife, and as the result of this argument about a bowling game, Agnes Morgan struck said Michael J. D. Noe which then developed into a minor altercation involving words and pushing between Cal Morgan and his wife, Agnes Morgan, on the one hand, and both of Plaintiffs' decedents, Robert D. Ruff and Michael J. D. Noe on the other; said activity involving no serious assaults of any kind. Almost immediately after the argument and minor altercation heretofore described commenced, defendant, Raymond L. Belcher, who was out of uniform and in no way identified as a Columbus policeman, and in no way involved in the minor dispute heretofore described, intervened by attacking one of plaintiffs' decedent from the rear by grabbing him around the neck from the rear; said intervention by said Raymond L. Belcher being without any notification or attempt to notify anybody in the Cafe that

he was an off-duty Columbus policeman and without any attempt by said Raymond L. Belcher to make a police arrest or a citizen's arrest of any kind; at this point, Plaintiff, Casey D. Stengel, came to the assistance of his companions, the other Plaintiffs' decedents by pulling Raymond L. Belcher from the back of one of Casey D. Stengel's said companions and thereafter Plaintiff, Casey D. Stengel, attempted to kick the chemical mace equipment which Raymond L. Belcher pulled from his clothing and which was blinding and choking the people involved from the hand of said Raymond L. Belcher; whereupon still without any warning, identification, or attempt to make an arrest, said Raymond L. Belcher, pulled a gun from his clothing which gun he was ordered and directed to carry as an off-duty Columbus policeman and shot one of the Plaintiffs' decedent, to-wit: Robert D. Ruff, which shooting caused the death of said Robert D. Ruff shortly thereafter and in the space of a couple of seconds thereafter, defendant, Raymond L. Belcher, shot Plaintiff, Casey D. Stengel, in the back as he had turned to get away from the chemical spray and to determine if other outsiders in the bar were going to make further intervention in the original argument; said shot by Raymond L. Belcher, hitting, Plaintiff, Casey D. Stengel, in the back in his spinal cord and causing Plaintiff, Casey D. Stengel, immediate and permanent paralysis of the lower part of his body which has caused Plaintiff to lose control of bodily functions of his body below where the bullet entered his spine and that such loss which is permanent includes but is not limited to the power to walk, the power to control his function of urinating and the power to fully control the function of defecation; within seconds thereafter defendant, Raymond L. Belcher, pursued Plaintiff decedent, Michael J. D. Noe, who was

trying to depart from the front door of the Cafe and shot said Plaintiff decedent, Michael J. D. Noe, from which shooting said Michael J. D. Noe died shortly thereafter.

9. Defendant, Dwight Joseph, as Police Chief of defendant, The City of Columbus, enforces the regulations and policies of the City of Columbus requiring off-duty, out-of-uniform police officers to carry guns and he and The City of Columbus knew or in the exercise of ordinary care and foresight should have known that off-duty police would drink hard liquor in bars which would adversely affect their judgment and control and emotions and that unjustified killings and serious injury as heretofore described in this Complaint would occur. By reason of all the foregoing facts heretofore recited in this Complaint, defendants, Raymond L. Belcher, Dwight Joseph and The City of Columbus acting under color of law and under the customs and usages of the Municipal Corporation of Columbus, Ohio, have deprived Plaintiff, Casey D. Stengel, of rights, privileges and immunity secured to him by the Constitution and Laws of the United States and particularly his rights to equal protection of the laws and to due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

10. Plaintiff, Casey D. Stengel, alleges that as a direct and proximate result of the acts of the defendants, Raymond L. Belcher, Dwight Joseph and the Municipal Corporation of Columbus, Ohio, heretofore, described, he has suffered permanent physical disability in that by reason of the shooting in the back in the spine he is permanently paralyzed from the waist down as heretofore described; that he has suffered much discomfort and pain, embarrassment and that he will be confined to a wheelchair for the rest of his life and that in addition

thereto vital functions of his body have been impaired to the extent that he will require permanent care and assistance by others to continue to live; and that he will suffer pain and discomfort and humiliation during the remainder of his life, and that he cannot sleep comfortably in a normal position because of sores that develop on his back and rectal area because of lack of bowel control which sores have since the incident forced him to discontinue an attempt that he has made to proceed with an educational program; that his earning capacity has been totally impaired, that he will continue to incur major expenses for medical care and treatment as he has in the past; that prior to the incident heretofore described Plaintiff, Casey D. Stengel, had honorably performed his military obligation to the United States having attained the rank of sergeant in Vietnam and having received the Purple Heart and two Bronze Stars for combat activity and that he had been honorably discharged from his military obligations and that after brief employment at the United States Post Office, had applied for admission for education at Ohio State University and had been accepted and would have started his college education the spring quarter of 1971 had not the incident heretofore described occurred. Plaintiff further alleges that prior to this incident he was 22 years of age and in excellent health and had a normal life to look forward to including association with a four-year old son and that by reason of the facts heretofore described defendants, have in effect, taken 90% of his life.

11. WHEREFORE, Plaintiff, Casey D. Stengel, claims damages of the defendants, Raymond L. Belcher, Dwight Joseph and The City of Columbus in the amount of ONE MILLION DOLLARS as compensatory damages and in an amount of FIVE HUNDRED THOUSAND

DOLLARS as punitive damages in the First Claim herein.

SECOND CLAIM

12. Plaintiff, Casey D. Stengel, incorporates and realleges paragraphs numbered one through nine of this Complaint as if fully rewritten herein.

13. Plaintiff, Casey D. Stengel, alleges that all of the named defendants participated in a conspiracy in connection with the incident heretofore described which was intended to deny this Plaintiff equal protection of the laws and due process of law and that this Plaintiff was injured and deprived of rights which are his under the Constitution of the United States, said conspiracy being an attempt by all the defendants to whitewash the incident by covering up the true story of what had occurred and as a protection and defense for the unlawful act of defendant, Raymond L. Belcher, filing unfounded charges against this Plaintiff of assault with intent to kill when in fact no such assault occurred and when in fact this Plaintiff was not armed with any weapon and when in fact this Plaintiff was shot in the back in connection with this incident. Additional and specific overt acts in furtherance of this conspiracy are as follows: (1) failure by Columbus Police to have a determination to the extent of alcohol in Officer Belcher's body at the time of the incident at a time when such determination would have been meaningful; (2) intimidation of witnesses by holding occupants of the Cafe at the time of the incident at the Columbus Police Station for four to six hours after the shooting during which time Officer Belcher's girlfriend who was not immediately taken to Police Headquarters as were the other occupants in the Cafe at the incident, was permitted to return to her apartment where she was met by an Officer Hawk with whom she

discussed the incident and then was taken to Police Headquarters for a formal statement; (3) intimidation of witnesses who were with the Plaintiff and Plaintiffs decedents prior to their visit to Jimmie's Cafe at the time of the incident in question; (4) preparing a tentative report that determined the cause of death of the two plaintiffs after less than 24 hours and announcing it to the news media which in effect usurped the function of the County Coroner of Franklin County; (5) giving a long series of incomplete and inaccurate reports of this incident to news media which tended to deprive Plaintiff, Casey D. Stengel, of his right to a fair trial on the false charges filed against him as a result of the attempt to whitewash the incident and protect Officer Raymond L. Belcher from responsibility for his unlawful acts; (6) announcing publicly for the first time after this incident a prior commendation allegedly given Officer Raymond L. Belcher for restraint in the use of force in another unrelated incident; and (7) giving conflicting reports to news media all of which were designed to justify the actions of defendant, Raymond L. Belcher.

14. Plaintiff, Casey D. Stengel, alleges that the conspiracy heretofore described was to obstruct justice by giving special protection to a fellow police officer, to-wit: Raymond L. Belcher, and was entered into and continued with intent to deny Plaintiff, Casey D. Stengel, and both of the plaintiffs' decedents equal protection of the laws and deprive Plaintiff, Casey D. Stengel, and the other plaintiffs of their rights to due process of law and further, Plaintiff, Casey D. Stengel, alleges that as part of the conspiracy heretofore described, Det. Sgt. P. Hopkins filed a false charge of assault with intent to kill which said Raymond L. Belcher knew was false as Plaintiff, Casey D. Stengel, was unarmed and was shot in the

back. Plaintiff, Casey D. Stengel, further alleges that he has suffered humiliation and deprivation of his liberty for brief periods during procedures in connection with the charge about many of which no fair attempt was made to notify him and has suffered humiliation and embarrassment by actions of the police in arresting him as a fugitive from the foregoing charge after prior notice to the news media when the police department knew or should have known with the exercise of any reasonable diligence that a paralyzed man was not a fugitive and when in fact Plaintiff, Casey D. Stengel, had been in Franklin County at all times since the incident, received regular treatment and care at Riverside Hospital, Columbus, Ohio, and at Dodd Hall, Ohio State University, both as a patient and an out-patient, that Casey D. Stengel's whereabouts was easily ascertained from the Franklin County Welfare Department from which he was receiving assistance for medical expenses and other expenses. Plaintiff, Casey D. Stengel, further alleges that he has suffered damages by reason of incurring expenses for counsel to defend the false charge which has been filed in bad faith and as part of an attempt to bargain with him for a release of any claims against defendant, Raymond L. Belcher, and defendant, The City of Columbus, which is all part of the pattern of conspiracy to protect a fellow police officer in trouble and deny an ordinary citizen due process of law and equal protection of the laws by obstructing justice and intimidating witnesses.

15. WHEREFORE, Plaintiff, Casey D. Stengel, prays for damages in the Second Claim therein against all the defendants in the amount of ONE HUNDRED THOUSAND DOLLARS as compensatory damages and for FIVE HUNDRED THOUSAND DOLLARS as punitive damages and that on final hearing all of the defendants

be permanently enjoined from harassing and interfering with the civil liberties of this Plaintiff.

THIRD CLAIM

16. Plaintiff, Charles Ruff, Administrator of the Estate of Robert D. Ruff, deceased, incorporates and realleges paragraphs numbered one through nine of this Complaint and further alleges that this plaintiff's decedent like plaintiff, Casey D. Stengel, for all the reasons given in paragraphs one through nine of the Complaint was deprived of rights, privileges and immunities secured to him by the Constitution and laws of the United States and particularly the right to equal protection of the laws and to due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

17. Plaintiff, Charles Ruff, Administrator, alleges that Robert D. Ruff was unarmed and not guilty of any conduct or attack on any person during the incident heretofore described in the Complaint and his killing occurred because of drinking by Raymond L. Belcher and his intervention in a minor argument as heretofore described in the Complaint and Raymond L. Belcher's sudden panic when Casey D. Stengel intervened after the sudden attack by Raymond L. Belcher as heretofore described in this Complaint.

18. Plaintiff, Charles Ruff, Administrator, alleges that Robert D. Ruff's wife and next of kin have suffered pecuniary damages in the amount of ONE HUNDRED THOUSAND DOLLARS by reason of his wrongful death of Robert D. Ruff.

19. WHEREFORE, Plaintiff, Charles Ruff, Administrator of the Estate of Robert D. Ruff, prays damages

against defendants, Raymond L. Belcher, Dwight Joseph, and The City of Columbus in the amount of ONE HUNDRED THOUSAND DOLLARS and costs.

FOURTH CLAIM

20. Plaintiff, Charles Ruff, Administrator of the Estate of Robert D. Ruff, incorporates and realleges paragraphs numbered twelve, thirteen and fourteen of the Complaint as if fully rewritten herein and further states that the conspiracy described by incorporating and realleging paragraphs twelve, thirteen, fourteen and fifteen of the Complaint was entered into and continued with intent to deny the Estate of Robert D. Ruff equal protection of the laws and due process of law and to obstruct justice and thus defeat the wrongful death claim of the Estate of Robert D. Ruff.

21. WHEREFORE, Plaintiff, Charles Ruff, Administrator of the Estate of Robert D. Ruff, prays damages against all the defendants named in this Complaint in the amount of TWENTY THOUSAND DOLLARS in this Fourth Claim.

FIFTH CLAIM

22. Plaintiff, Timothy Noe, Administrator of the Estate of Michael J. D. Noe, deceased, incorporates and realleges paragraphs numbered one through nine of this Complaint and further alleges that this Plaintiff's decedent like Plaintiff, Casey D. Stengel, for all the reasons given in Paragraphs one through nine of the Complaint was deprived of rights, privileges and immunities secured to him by the Constitution and laws of the United States and particularly the right to equal protection of the laws and to due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

23. Plaintiff, Timothy Noe, Administrator, alleges that Michael J. D. Noe was unarmed and not guilty of any conduct or attack on any person during the incident heretofore described in this Complaint and that the killing of Michael J. D. Noe occurred because of drinking by Raymond L. Belcher and his intervention in a minor argument as heretofore described in the Complaint and Raymond L. Belcher's total panic when Plaintiff, Casey D. Stengel, intervened as heretofore described after the attack by Raymond L. Belcher as heretofore described in this Complaint.

24. Plaintiff, Timothy Noe, Administrator of the Estate of Michael J. D. Noe, alleges that the next of kin of Michael J. D. Noe have suffered pecuniary damages in the amount of THIRTY THOUSAND DOLLARS by reason of the wrongful death of Michael J. D. Noe as heretofore described.

25. WHEREFORE, Timothy Noe, Administrator of the Estate of Michael J. D. Noe, prays damages against defendants, Raymond L. Belcher, Dwight Joseph and The City of Columbus in the amount of THIRTY THOUSAND DOLLARS and his costs in this Fifth Claim.

SIXTH CLAIM

26. Plaintiff, Timothy Noe, Administrator of the Estate of Michael J. D. Noe, incorporates and realleges paragraphs twelve, thirteen and fourteen of the Complaint as if fully rewritten herein and further states that conspiracy described by such incorporated and realleged paragraphs was entered into and continued with intent to deny the Estate of Michael J. D. Noe equal protection of the laws and due process of law and with intent to obstruct justice and thus defeat the wrongful

death claim of the Estate of Michael J. D. Noe heretofore described.

27. WHEREFORE, Plaintiff, Timothy Noe, Administrator of the Estate of Michael J. D. Noe, prays damages against all the defendants named in this Complaint in the amount of TWENTY THOUSAND DOLLARS in this Sixth Claim and for his costs.

SEVENTH CLAIM

28. For a Seventh Claim the Plaintiff, Casey D. Stengel, incorporates and realleges paragraphs numbered one through twenty-seven of this Complaint as if fully rewritten herein.

29. Pursuant to the provisions of Rule 23 (c)(4), Federal Rules of Civil Procedure, Plaintiff, Casey D. Stengel, brings the Seventh Claim on behalf of himself and all the other citizens of the City of Columbus, Ohio, a class of approximately 539,700 persons. Joinder of all members of the class for this claim is impracticable. There are questions of law or fact common to the class.

30. Plaintiff alleges that the City of Columbus, Ohio, by police regulation, requires off-duty policemen to carry arms at all times based on the theory that police officers and the police chief are on duty 24 hours of each day.

31. As a result of said regulation, police officers of the City of Columbus carry concealed arms at all times even though said officers are not in uniform and are not identifiable to the public as police officers or as persons who are carrying lethal weapons.

32. During the regular eight hour tours of duty of Columbus police officers their conduct is governed by regulations about drinking, and many other regulations

about conduct and associations outside their official duties which do not apply during the sixteen hours of a day which are not within their regular tour of duty with the result that a large partially unregulated partially secret, but not an undercover or detective, police force is at large in the city with lethal weapons but without specific purpose of law enforcement at locations and at times and under conditions such as social drinking and rendezvous with members of the opposite sex which tend to impair the ability to exercise proper judgment and impair the ability to perform responsible and effective police work.

33. The aforesaid regulation requiring police officers to carry arms at all times seriously endangers the health, safety and welfare of the citizens of Columbus and endangers the constitutional rights of such citizens to due process of law and equal protection of the laws.

34. The aforesaid regulation exposes the citizens of Columbus to unnecessary danger by creating a situation whereby a citizen might incur serious bodily harm by refusing to obey the order of an off-duty policeman who is not known to such a citizen to be an officer of the law.

35. The aforesaid regulation instills or tends to instill in the police officers of the City of Columbus a mental attitude of secretiveness, intrigue and authority that is contrary to the health, safety and welfare of the citizens of Columbus and creates an imminent danger to the life and liberty of such citizens and to their rights guaranteed by the United States Constitution.

36. WHEREFORE, Plaintiff, Casey D. Stengel, on behalf of himself as a citizen of Columbus, Ohio, and all other members of such class prays in this Seventh Claim that the City of Columbus, Ohio, and all other defendants

herein be permanently enjoined from granting immunity to its police officers from the statutory law of Ohio which prohibits the carrying of concealed weapons when such officers are not in uniform or on a regular tour of duty in the nature of a plain clothes assignment or not performing ordinary and normal duties during the hours of full time, assigned and compensated duty and further prays that defendant, the City of Columbus, be permanently enjoined from enforcing the regulation authorizing its police officers to be armed at all times and authorizing said police officers to carry concealed weapons under color of law while engaged in personal activities.

DEMAND FOR JURY TRIAL

All Plaintiffs herein demand trial by jury of all claims in the Complaint to which they are entitled to a jury.

[Signatures omitted in printing]

JOINT EXHIBIT 44(b)

GENERAL ORDER

Columbus Police **Columbus, Ohio**

GENERAL ORDER NO. 70-9D	DATE OF ISSUE July 30, 1970
EFFECTIVE DATE July 30, 1970	RESCINDS General Order 70-1D
SUBJECT Weapons Regulations	REFERENCE Rule Book, Sections 480, 482

PURPOSE: The purpose of this general order is to clarify the weapons regulations of the Columbus Division of Police as they relate to types of authorized weapons and related equipment, the carrying of personal weapons and related equipment, the responsibility for their inspection, repair and maintenance, and the responsibility to report any discharge of a police weapon.

I GENERAL INFORMATION

A. **Carrying a Weapon on Duty**

Members of the Division of Police, while on duty, shall carry the weapon and ammunition issued to them.

1. Carrying a Personal Weapon on Duty
Members of the Division of Police desiring to carry a personal handgun **in addition to** their issue revolver shall request permission through the Police Range Officer. The Range Officer, after the weapon has been inspected and registered, shall forward the request to the Chief of Police for approval. Permission may be granted provided the following conditions are met:

a. The weapon shall be inspected, registered and approved by the Police Range Officer.

b. The weapon shall not exceed .38 caliber.
(1) The .357 Magnum is prohibited.

B. **Carrying a Weapon Off Duty**

Members of the Division of Police, while off duty, shall carry the weapon and ammunition issued to them.

1. Carrying a Personal Weapon Off Duty
Members of the Division of Police desiring to carry a personal handgun **instead of** their issue revolver shall request permission through the Police Range Officer. The Range Officer, after the weapon has been inspected and registered, shall forward the request to the Chief of Police for approval. Permission may be granted provided the following conditions are met:

a. The weapon shall be inspected, registered and approved by the Police Range Officer.

b. The weapon shall not exceed a .38 caliber.

(1) The .357 Magnum is prohibited.

It is recognized that there may be certain occasions when carrying a weapon while off duty would be impractical. An example is when a member is engaged in some sport or activity and the accepted style of clothing would restrict or preclude the carrying of a weapon.

Therefore, it is up to the good judgment of each member as to when it would be impractical to carry a weapon while off duty. If the member feels that the circumstances so warrant, he need not carry the weapon while off duty; however, justification for failing to do so may be required.

C. **Type of Handgun Ammunition Specified**

1. Regulation Super Vel 110 grain, .38 special, semi-ball, solid nose, factory load cartridges shall be carried and used at all times.
   a. In those cases where carrying a personal handgun has been authorized, appropriate ammunition may be carried and used.
2. No military or other jacketed bullet ammunition shall be carried. Dum-dum, hollow-point, wad-cutter, tracers or hand-loads shall not be carried or used at any time.

II INSPECTION, REPAIR AND MAINTENANCE OF WEAPONS

A. **Periodic Inspection Required**

Supervisory officers are responsible for the periodic inspection of all issued or authorized weapons and related equipment carried by their subordinates, in order to insure that they are in proper working order and fully comply with the provisions of this order.

B. **Repair and Maintenance of Issued Weapons and Related Equipment**

All issued weapons and related equipment in need of repair, adjustment or refinishing shall be submitted to the Police Range Officer.

1. Members of the Division of Police shall not permit any person, except those authorized by the Police Range Officer to perform repair work of any kind on any issued weapon or related equipment.
2. Members of the Division of Police shall be held strictly accountable for any damage to issued weapons or related equipment, which is caused by roughness, carelessness, or by permitting any unauthorized person to use, tamper with or repair his weapon or related equipment.

III CERTAIN WEAPONS PROHIBITED

A. **General**

No member or employee of the Division of Police shall carry, have in his possession or use, at any time, any weapon of the type commonly referred to as "brass knuckles" or other similar weapons.

1. Any weapon, worn on the hand or concealed in gloves, made of a hard material (metal, wood, plastic, etc.) shall be prohibited by this order.
2. This order does not prohibit the carrying or use of the night stick, riot baton or blackjack.

B. **Rifles and Shotguns**

Members and employees of the Division of Police are prohibited from carrying, having in their possession or using any personal weapons such as rifles, carbines or shotguns, of any description, while on duty.

C. **Other Weapons**

Members and employees of the Division of Police are prohibited from carrying, having in their possession or using any personal weapons such as automatic or semi-automatic rifles, carbines or shotguns, of any description, while on duty.

IV REPORTING REQUIREMENTS

A. **Procedure to be Followed When Firearm is Discharged**

1. An officer shall be subject to discipline if the of a firearm involves:
   a. A violation of law by him.
   b. A violation of department regulations.
   c. Poor judgment involving wanton disregard of public safety.
   d. Accidental discharge of gun through carelessness or horseplay.
2. In order to enforce the guidelines for use of weapons, the Police Division shall require a detailed written report on all discharges of firearms except at an approved range.
   a. Whenever a police officer discharges his firearm, either accidentally or in the performance of police duty, he shall verbally notify his immediate on-duty supervisor as soon as time and circumstances permit. Further, a police officer who discharges his firearm shall forward a written report of the incident through established channels to the police chief and a carbon copy to his superior officer within his tour of duty of the incident.

3. Each discharge of a firearm, except at an approved range, shall be investigated by an on-duty commanding officer. After conducting a thorough investigation of the circumstances surrounding the discharge of firearms, the commanding officer shall submit a detailed written report of the results of the investigation to the police chief through channels.

BY ORDER OF:
DWIGHT W. JOSEPH
Chief of Police

APPROVED BY:
JAMES J. HUGHES, JR.
Director of Public Safety

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action 72-67

(Title Omitted in Printing)

PROCEEDING

Before the Honorable Joseph P. Kinneary, Chief Judge, and jury duly empaneled and sworn, sitting at Columbus, Ohio.

FRIDAY MORNING SESSION
JUNE 14, 1974.

RAYMOND BELCHER

called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

[pp. 650, 651, 652 and 661]

[650] I took my tear gas cannister from my pocket, put it in my hand, and in half-croached positions, slid out of the booth. My intention at that time was to walk directly to the front door of Jimmie's Cafe, go through the door, outside, go out onto the sidewalk and use the phone booth which is located just about 20 feet from the front door of that bar.

My intention was not to call the police from inside. I felt at that time that I would never be allowed to make that call. As I stood up from the booth, Mr. Stengel ran from the juke box, he jumped right on my back, locked his arms around my neck and I was nearly thrown to the floor.

I believe I had reached a standing position. I twisted my face around to Mr. Stengel and I said, Let go of me."

Mr. Stengel began throwing punches, attempting to strike me with his fist, and attempted to throw me to the floor. I grabbed ahold of the side of the booth and again told him to let go of me.

Mr. Ruff ran across the floor at that point and I was fighting both men. I was tripped or thrown on top of a small table there by the front of the bar itself, I think they are known as cabaret or cafe tables, they are very small tables, maybe two feet square.

My back went over this table. My head struck the juke box, and I recall being kicked for a moment after that. I was **[651]** kicked several times and then there was a moment of darkness where I could neither feel nor hear anything. I don't know whether I was unconscious or apparently I was, but how long I was unconscious I have no idea. It could have been ten seconds; it could have been ten minutes.

As I looked up from the floor with my legs up over a table, I could see nothing but feet and fists. I was being kicked in the face and the head by at least two men.

At that time I tried to get off the floor. I literally tried to pull myself up off the floor by using the men's clothing that were on top of me. I at one point had a man's belt in my hand and tried to drag myself up off the floor by his belt buckle, so I could get up off the floor and defend myself.

I was kicked first one direction, then the other direction. I continued to try to get up off the floor. I was getting tired. I was beginning to lose.

At that time somewhere in this struggle my tear gas was kicked out of my hand. I had been spraying it, trying to spray directly into these men's faces from the floor

but somewhere during the fight the tear gas was stomped from my hand.

As I began to realize that I wasn't gonna be able to get myself off the floor, I reached for the pistol that I carried in my waistband in my pants. At that time I was carrying a .32 Browning automatic, and the gun was not there. **[652]**

I was still being kicked and stomped. I put my arms, my left arm over my face to shield my face from these kicks, and looked across the shiny barroom floor to see if the pistol was lying there some place.

The gun was not there. The thought went through my mind, oh, God, if these men, whoever they are, find that gun on the floor, they will kill me with my own weapon.

I felt the pistol underneath my back, still being kicked and stomped. I brought the weapon around in my right hand and shoved backwards to get these men off of me and I fired three shots straight into the ceiling, or straight into the mass of bodies that were on top of me.

Two men fell to the floor, one man, the young man I know as Mike Noe, ran out the door. I got onto my feet and chased Mr. Noe outside. I did catch up with him. We struggled. Mr. Noe was struggling violently with me as if to escape. I struck Mr. Noe with the pistol across the face.

This struggle took place on the sidewalk in front of the bar directly in front of the large front window of Jimmie's Cafe. As I struck Mr. Noe, I was facing the front of the bar and the gun went off I believe as it struck his forehead or as my arm came forward. I still couldn't say when it happened.

* * *

[661] MR. HUGHES: Officer Belcher, as you were laying on the floor after you had come to after you had recovered your weapon, as you removed the weapon from behind your back and pointed it upward —

MR. TAYLOR: I object to the form even at this stage.

THE COURT: Your objection is premature. Q. — what thought was in your mind?

THE COURT: Just a minute. Do you object to this question?

MR. TAYLOR: Yes, sir.

THE COURT: Come up.

(Thereupon followed a discussion off the record.)

THE COURT: The objection is overruled. You may answer that question. A. I am sorry. Sir, would you repeat the question?

THE COURT: Have the reporter read it back.

(Thereupon said question was read back.) A. The thought in my mind at that point was that I was going to be killed on that barroom floor if I did not use the weapon I had, I would be killed.

APPENDIX

Supreme Court of the United States

October Term, 1975

No. 75-823

RAYMOND BELCHER,
Petitioner,

v.

CASEY D. STENGEL, et al.,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VOLUME 1 OF 2

Petition for Certiorari filed December 10, 1975
Certiorari Granted April 5, 1976

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-823

RAYMOND BELCHER,

Petitioner,

v.

CASEY D. STENGEL, et al.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX PAGES 116-260 APPEAR IN VOLUME 2

Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

CASEY D. STENGEL, et al.,
Plaintiffs,
v.
RAYMOND L. BELCHER, et al.,
Defendants.

RELEVANT DOCKET ENTRIES

2-28-72 Complaint filed. Summonses executed for service by MSCO. (extra copies of the complaint filed in folder numbered "2", for the "John Does".).

3-22-72 Stipulation, defendants given until April 19, 1972 to move or plead, filed.

5- 2-72 Agreement for Extension of Time to Move or Plead filed: until May 31st, 1972 for defendant, Raymond L. Belcher.

5- 8-72 Agreement for Extension of Time to file Answer Memoranda filed: plaintiffs may file Answer Memoranda on or before June 8th, 1972.

5-26-72 Motion of Defendant, Raymond L. Belcher, with memo attached, filed.

3-19-73 Opinion and Order filed: the defendants' motion to dismiss is DENIED. (cc John Lewis/Dale Crawford).

3-30-73 Answer of all Defendants, filed.

6-25-73 Defendants' statement of issues filed.

6-10-74 Note: Jury trial commenced before the Hon. Joseph P. Kinneary.

6-18-74 Verdict in favor of plaintiff Casey D. Stengel, actual damages in the amount of $800,000.00 and punitive damages at $1,000.00, filed.

6-18-74 Verdict in favor of plaintiff Charles Ruff, Admin. in the amount of $19,000.00 and punitive damages in the amount of $1,000.00, filed.

6-18-74 Verdict in favor of the plaintiff Timothy Noe, Admin., actual damages in the amount of $9,000.00 and punitive damages in the amount of $1,000.00, filed.

6-19-74 Judgment—The plaintiff, Casey D. Stengel recover of the defendant, Raymond L. Belcher, the sum of $800,000.00 actual damages and the sum of $1,000.00 punitive damages, a total of $801,000.00, with interest thereon at the rate of 6% as provided by law and his costs of action; The plaintiff, Charles Ruff, Administrator of the Estate of Robert D. Ruff, Deceased, recover of the defendant, Raymond L. Belcher, the sum of $19,000.00 actual damages and the sum of $1,000.00 punitive damages, a total of $20,000.00, with interest thereon at the rate of 6% as provided by law and his costs of action; That the plaintiff Timothy Noe, Administrator of the Estate of Michael J. D. Noe, Deceased, recover of the defendant, Raymond L. Belcher, the sum of $9,000.00 actual damages and the sum of $1,000.00 punitive damages, a total of $10,000.00, with interest thereon at the rate of 6% as provided by law and his costs of action, filed.

6-28-74 Motion of deft, Raymond L. Belcher, for a judgment notwithstanding the verdict, a new trial and/or an order altering or amending the judgment filed.

9-11-74 Order—Plaintiff's motion for substitution as a party plaintiff Granted. Albert J. Leshy as Admin. is hereby substituted as party plaintiff for Timothy Noe. Defendants motion for a judgment notwithstanding the verdict, motion for a new trial and for an altering or amending of the judgment Denied, filed. Copy to Lewis Taylor and Hughes.

10- 9-74 Notice of Appeal, filed. ($250.00 Appeal Bond Deposited in Registry)

11-15-74 Transcript filed.

11-15-74 Record certified to USCA6th, copy of certificate to Lewis/Taylor/City Atty.

3- 4-75 Certificate returned from USCA6th, given #75-1075 on 1-22-75.

10-20-75 Order filed: from USCA6th, this AFFIRMS the decision of the District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division

No. 72-67

CASEY D. STENGEL, individually and on behalf of
all persons similarly situated
295 Arcadia Avenue
Columbus, Ohio 43202
and
CHARLES RUFF, Administrator
of the Estate of
ROBERT D. RUFF, deceased
186 Clinton Street
Columbus, Ohio 43202
and
TIMOTHY NOE, Administrator
of the Estate of
MICHAEL J. D. NOE, deceased
1430 Ombersley Lane
Columbus, Ohio 43221

Plaintiffs

vs.

RAYMOND L. BELCHER, individually
and as a Police Officer of
The City of Columbus
Police Department
120 West Gay Street
Columbus, Ohio 43215
and

DWIGHT JOSEPH, individually
and as Police Chief for
The City of Columbus
Police Department
120 West Gay Street
Columbus, Ohio 43215
and
JOHN HAWK, individually
and as a Police Officer of
The City of Columbus
Police Department
120 West Gay Street
Columbus, Ohio 43215
and
FRANCIS B. SMITH, individually
and as a Police Captain of
The City of Columbus
Police Department
120 West Gay Street
Columbus, Ohio 43215
and
ROBERT TAYLOR, individually
and as a Police Captain of
The City of Columbus
Police Department
120 West Gay Street
Columbus, Ohio 43215
and
RICHARD O. BORN, individually
and as a Police Captain of
The City of Columbus
Police Department
120 West Gay Street
Columbus, Ohio 43215

and

EARL BELCHER, individually
and as Police Lieutenant of
The City of Columbus
Police Department
120 West Gay Street
Columbus, Ohio 43215

and

THE CITY OF COLUMBUS, OHIO,
a municipal corporation of
The State of Ohio
City Hall
90 West Broad Street
Columbus, Ohio 43215

and

JOHN DOE-1, JOHN DOE-2, JOHN DOE-3,
JOHN DOE-4, JOHN DOE-5, JOHN DOE-6,
JOHN DOE-7, JOHN DOE-8, JOHN DOE-9,
JOHN DOE-10, JOHN DOE-11, JOHN DOE-12,
Police and Administrative Officials of
The City of Columbus, whose identities are unknown
Police Department
120 West Gay Street
Columbus, Ohio 43215

and

DETECTIVE SGT. P. HOPKINS, individually
and as a Police Officer of
The City of Columbus
Police Department
120 West Gay Street
Columbus, Ohio 43215

and

JAMES NEWELL, individually
and as a Police Officer of
The City of Columbus
Police Department
120 West Gay Street
Columbus, Ohio 43215

and

E. R. WOODS, individually
and as a Police Officer of
The City of Columbus
Police Department
120 West Gay Street
Columbus, Ohio 43215

and

E. YOUNG, individually
and as a Police Officer of
The City of Columbus
Police Department
120 West Gay Street
Columbus, Ohio 43215

and

M. HARDIN, individually
and as a Police Officer of
The City of Columbus
Police Department
120 West Gay Street
Columbus, Ohio 43215

Defendants

COMPLAINT

1. Jurisdiction of this Court is invoked under the Fourteenth Amendment, United States Constitution and Title 28, United States Code Sections 1331 and 1343 and Title 42, United States Code Sections 1983 and 1985.

2. The matter in controversy exceeds the sum or value of Ten Thousand Dollars, exclusive of interest and costs.

FIRST CLAIM

3. During all times herein mentioned, Plaintiff, Casey D. Stengel and Plaintiffs' decedents, Robert D. Ruff and Michael J. D. Noe, were citizens of the United States residing in the City of Columbus, County of Franklin, and State of Ohio, and Plaintiff, Casey D. Stengel, is of full age. Plaintiff, Charles Ruff, is the duly qualified and acting Administrator of the Estate of Robert D. Ruff, and brings this action on behalf of the wife and the next of kin of said decedent who would be entitled to inherit under the Ohio statutes of descent and distribution. Plaintiff, Timothy Noe, is the duly qualified and acting Administrator of the Estate of Michael J. D. Noe, and brings this action on behalf of the next of kin of said decedent, Michael J. D. Noe, who would be entitled to inherit from Michael J. D. Noe, pursuant to the Ohio statues of descent and distribution.

4. During all times mentioned herein, defendant, Dwight Joseph, was the duly appointed, qualified and presently acting Chief of Police in charge of the police force of the City of Columbus, Ohio.

5. During all times mentioned herein, defendants, Raymond L. Belcher, John Hawk, Francis B. Smith,

Robert Taylor, Richard O. Born, Earl Belcher, Detective Sgt. P. Hopkins, James Newell, E. R. Woods, E. Young, M. Hardin and John Doe defendants, one through twelve, were duly appointed, qualified and acting police officers or administrative officials of the Police Department of the City of Columbus, a municipal corporation of the State of Ohio, and were agents of the said City acting or purporting to act in the course of their employment and engaged or purported to be engaged in the performance of their duties as police officers or administrative officials of said City and acting pursuant to orders, directives and regulations of said Police Department and orders and directives from defendant, Dwight Joseph, Police Chief of the City of Columbus, and all the conduct of all the defendants in connection with facts alleged in this Complaint has been ratified and condoned by defendant, The City of Columbus, through acts and conduct of its Chief Police Officer, Dwight Joseph and other duly authorized supervisory personnel. Defendant Police Lieutenant Earl Belcher is believed to be a blood relative of defendant, Raymond L. Belcher.

6. During all times herein mentioned the defendants and each of them were persons acting under color of the statutes, ordinances, regulations, customs and usages of the State of Ohio, County of Franklin, and The City of Columbus.

7. The City of Columbus at all times herein mentioned was the employer of the other defendants and each of them. Said City at all times herein mentioned provided the individual defendants and each of them with an official badge and identification card which designed and described its bearer as Police Chief or officer of said City's Department of Police. During

all times herein mentioned The City of Columbus by police regulation ordered off-duty policemen to carry arms at all times based on the theory that said police officers and police chief are on duty 24 hours of each day.

8. On or about March 1st, 1971, at approximately 1:30 A.M., Plaintiff, Casey D. Stengel, in company with Robert D. Ruff and Michael J. D. Noe who are the other plaintiffs decedents, were all patrons at a tavern known as Jimmie's Cafe, 2338 Summit Street in the City of Columbus, Ohio, when an argument developed between Michael J. D. Noe, one of the other plaintiffs decedent, and two other patrons at the Cafe, Cal Morgan and Agnes Morgan, husband and wife, and as the result of this argument about a bowling game, Agnes Morgan struck said Michael J. D. Noe which then developed into a minor altercation involving words and pushing between Cal Morgan and his wife, Agnes Morgan, on the one hand, and both of Plaintiffs decedents, Robert D. Ruff and Michael J. D. Noe on the other; said activity involving no serious assaults of any kind. Almost immediately after the argument and minor altercation heretofore described commenced, defendant, Raymond L. Belcher, who was out of uniform and in no way identified as a Columbus policeman, and in no way involved in the minor dispute heretofore described, intervened by attacking one of plaintiffs decedent from the rear by grabbing him around the neck from the rear; said intervention by said Raymond L. Belcher being without any notification or attempt to notify anybody in the Cafe that he was an off-duty Columbus policeman and without any attempt by said Raymond L. Belcher to make a police arrest or a citizen's arrest of any kind; at this

point, Plaintiff, Casey D. Stengel, came to the assistance of his companions, the other Plaintiffs decedents by pulling Raymond L. Belcher from the back of one of Casey D. Stengel's said companions and thereafter Plaintiff, Casey D. Stengel, attempted to kick the chemical mace equipment which Raymond L. Belcher pulled from his clothing and which was blinding and choking the people involved from the hand of said Raymond L. Belcher; whereupon still without any warning, identification, or attempt to make an arrest, said Raymond L. Belcher, pulled a gun from his clothing which gun he was ordered and directed to carry as an off-duty Columbus policeman and shot one of the Plaintiff's decedent, to-wit: Robert D. Ruff, which shooting caused the death of said Robert D. Ruff shortly thereafter and in the space of a couple of seconds thereafter, defendant, Raymond L. Belcher, shot Plaintiff, Casey D. Stengel, in the back as he had turned to get away from the chemical spray and to determine if other outsiders in the bar were going to make further intervention in the original argument; said shot by Raymond L. Belcher, hitting, Plaintiff, Casey D. Stengel, in the back in his spinal cord and causing Plaintiff, Casey D. Stengel, immediate and permanent paralysis of the lower part of his body which has caused Plaintiff to lose control of bodily functions of his body below where the bullet entered his spine and that such loss which is permanent includes but is not limited to the power to walk, the power to control his function of urinating and the power to fully control the function of defecation; within seconds thereafter defendant, Raymond L. Belcher, pursued Plaintiff decedent, Michael J. D. Noe, who was trying to depart from the front door

of the Cafe and shot said Plaintiff decedent, Michael J. D. Noe, from which shooting said Michael J. D. Noe died shortly thereafter.

9. Defendant, Dwight Joseph, as Police Chief of defendant, The City of Columbus, enforces the regulations and policies of the City of Columbus requiring off-duty, out-of-uniform police officers to carry guns and he and The City of Columbus knew or in the exercise of ordinary care and foresight should have known that off-duty police would drink hard liquor in bars which would adversely affect their judgment and control and emotions and that unjustified killings and serious injury as heretofore described in this Complaint would occur. By reason of all the foregoing facts heretofore recited in this Complaint, defendants, Raymond L. Belcher, Dwight Joseph and The City of Columbus acting under color of law and under the customs and usages of the Municipal Corporation of Columbus, Ohio, have deprived Plaintiff, Casey D. Stengel, of rights, privileges and immunity secured to him by the Constitution and Laws of the United States and particularly his rights to equal protection of the laws and to due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

10. Plaintiff, Casey D. Stengel, alleges that as a direct and proximate result of the acts of the defendants, Raymond L. Belcher, Dwight Joseph and the Municipal Corporation of Columbus, Ohio, heretofore described, he has suffered permanent physical disability in that by reason of the shooting in the back in the spine he is permanently paralyzed from the waist down as heretofore described; that he has suffered much discomfort and pain, embarrassment and

that he will be confined to a wheelchair for the rest of his life and that in addition thereto vital functions of his body have been impaired to the extent that he will require permanent care and assistance by others to continue to live; and that he will suffer pain and discomfort and humiliation during the remainder of his life, and that he cannot sleep comfortably in a normal position because of sores that develop on his back and rectal area because of lack of bowel control which sores have since the incident forced him to discontinue an attempt that he has made to proceed with an educational program; that his earning capacity has been totally impaired, that he will continue to incur major expenses for medical care and treatment as he has in the past; that prior to the incident heretofore described Plaintiff, Casey D. Stengel, had honorably performed his military obligation to the United States having attained the rank of sergeant in Vietnam and having received the Purple Heart and two Bronze Stars for combat activity and that he had been honorably discharged from his military obligations and that after brief employment at the United States Post Office, had applied for admission for education at Ohio State University and had been accepted and would have started his college education the spring quarter of 1971 had not the incident heretofore described occurred. Plaintiff further alleges that prior to this incident he was 22 years of age and in excellent health and had a normal life to look forward to including association with a four-year old son and that by reason of the facts heretofore described defendants, have in effect, taken 90% of his life.

11. WHEREFORE, Plaintiff, Casey D. Stengel, claims damages of the defendants, Raymond L. Bel-

cher, Dwight Joseph and The City of Columbus in the amount of ONE MILLION DOLLARS as compensatory damages and in an amount of FIVE HUNDRED THOUSAND DOLLARS as punitive damages in the First Claim herein.

SECOND CLAIM

12. Plaintiff, Casey D. Stengel, incorporates and realleges paragraphs numbered one through nine of this Complaint as if fully rewritten herein.

13. Plaintiff, Casey D. Stengel, alleges that all of the named defendants participated in a conspiracy in connection with the incident heretofore described which was intended to deny this Plaintiff equal protection of the laws and due process of law and that this Plaintiff was injured and deprived of rights which are his under the Constitution of the United States, said conspiracy being an attempt by all the defendants to whitewash the incident by covering up the true story of what had occurred and as a protection and defense for the unlawful act of defendant, Raymond L. Belcher, filing unfounded charges against this Plaintiff of assault with intent to kill when in fact no such assault occurred and when in fact this Plaintiff was not armed with any weapon and when in fact this Plaintiff was shot in the back in connection with this incident. Additional and specific overt acts in furtherance of this conspiracy are as follows: (1) failure by Columbus Police to have a determination to the extent of alcohol in Officer Belcher's body at the time of the incident at a time when such determination would have been meaningful; (2) intimidation of witnesses by holding occupants of the Cafe at the time of the incident at the Columbus Police Station for four to six hours after the shooting during which time Officer Belcher's girlfriend who was not immediately taken to Police Headquarters as were the other occupants in the Cafe at the incident, was permitted to return to her apartment where she was met by an Officer Hawk with whom she discussed the incident and then was taken to Police Headquarters for a formal statement; (3) intimidation of witnesses who were with the Plaintiff and Plaintiffs decedents prior to their visit to Jimmie's Cafe at the time of the incident in question; (4) preparing a tentative report that determined the cause of death of the two plaintiffs after less than 24 hours and announcing it to the news media which in effect usurped the function of the County Coroner of Franklin County; (5) giving a long series of incomplete and inaccurate reports of this incident to news media which tended to deprive Plaintiff, Casey D. Stengel, of his right to a fair trial on the false charges filed against him as a result of the attempt to whitewash the incident and protect Officer Raymond L. Belcher from responsibility for his unlawful acts; (6) announcing publicly for the first time after this incident a prior commendation allegedly given Officer Raymond L. Belcher for restraint in the use of force in another unrelated incident; and (7) giving conflicting reports to news media all of which were designed to justify the actions of defendant, Raymond L. Belcher.

14. Plaintiff, Casey D. Stengel, alleges that the conspiracy heretofore described was to obstruct justice by giving special protection to a fellow police officer, to-wit: Raymond L. Belcher, and was entered into and continued with intent to deny Plaintiff, Casey D. Stengel, and both of the plaintiffs' decedents equal

protection of the laws and deprive Plaintiff, Casey D. Stengel, and the other plaintiffs of their rights to due process of law and further, Plaintiff, Casey D. Stengel, alleges that as part of the conspiracy heretofore described, Det. Sgt. P. Hopkins filed a false charge of assault with intent to kill which said Raymond L. Belcher knew was false as Plaintiff, Casey D. Stengel, was unarmed and was shot in the back. Plaintiff, Casey D. Stengel, further alleges that he has suffered humiliation and deprivation of his liberty for brief periods during procedures in connection with the charge about many of which no fair attempt was made to notify him and has suffered humiliation and embarrassment by actions of the police in arresting him as a fugitive from the foregoing charge after prior notice to the news media when the police department knew or should have known with the exercise of any reasonable diligence that a paralyzed man was not a fugitive and when in fact Plaintiff, Casey D. Stengel, had been in Franklin County at all times since the incident, received regular treatment and care at Riverside Hospital, Columbus, Ohio, and at Dodd Hall, Ohio State University, both as a patient and an out-patient, that Casey D. Stengel's whereabouts was easily ascertained from the Franklin County Welfare Department from which he was receiving assistance for medical expenses and other expenses. Plaintiff, Casey D. Stengel, further alleges that he has suffered damages by reason of incurring expenses for counsel to defend the false charge which has been filed in bad faith and as part of an attempt to bargain with him for a release of any claims against defendant, Raymond L. Belcher, and defendant, The City of Columbus, which is all part of the pattern of conspiracy

to protect a fellow police officer in trouble and deny an ordinary citizen due process of law and equal protection of the laws by obstructing justice and intimidating witnesses.

15. WHEREFORE, Plaintiff, Casey D. Stengel, prays for damages in the Second Claim herein against all the defendants in the amount of ONE HUNDRED THOUSAND DOLLARS as compensatory damages and for FIVE HUNDRED THOUSAND DOLLARS as punitive damages and that on final hearing all of the defendants be permanently enjoined from harassing and interfering with the civil liberties of this Plaintiff.

THIRD CLAIM

16. Plaintiff, Charles Ruff, Administrator of the Estate of Robert D. Ruff, deceased, incorporates and realleges paragraphs numbered one through nine of this Complaint and further alleges that this plaintiff's decedent like plaintiff, Casey D. Stengel, for all the reasons given in paragraphs one through nine of the Complaint was deprived of rights, privileges and immunities secured to him by the Constitution and laws of the United States and particularly the right to equal protection of the laws and to due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

17. Plaintiff, Charles Ruff, Administrator, alleges that Robert D. Ruff was unarmed and not guilty of any conduct or attack on any person during the incident heretofore described in the Complaint and his killing occurred because of drinking by Raymond L. Belcher and his intervention in a minor argument as heretofore described in the Complaint and Ray-

mond L. Belcher's sudden panic when Casey D. Stengel intervened after the sudden attack by Raymond L. Belcher as heretofore described in this Complaint.

18. Plaintiff, Charles Ruff, Administrator, alleges that Robert D. Ruff's wife and next of kin have suffered pecuniary damages in the amount of ONE HUNDRED THOUSAND DOLLARS by reason of his wrongful death of Robert D. Ruff.

19. WHEREFORE, Plaintiff, Charles Ruff, Administrator of the Estate of Robert D. Ruff, prays damages against defendants, Raymond L. Belcher, Dwight Joseph, and The City of Columbus in the amount of ONE HUNDRED THOUSAND DOLLARS and costs.

FOURTH CLAIM

20. Plaintiff, Charles Ruff, Administrator of the Estate of Robert D. Ruff, incorporates and realleges paragraphs numbered twelve, thirteen and fourteen of the Complaint as if fully rewritten herein and further states that the conspiracy described by incorporating and realleging paragraphs twelve, thirteen, fourteen and fifteen of the Complaint was entered into and continued with intent to deny the Estate of Robert D. Ruff equal protection of the laws and due process of law and to obstruct justice and thus defeat the wrongful death claim of the Estate of Robert D. Ruff.

21. WHEREFORE, Plaintiff, Charles Ruff, Administrator of the Estate of Robert D. Ruff, prays damages against all the defendants named in this Complaint in the amount of TWENTY THOUSAND DOLLARS in this Fourth Claim.

FIFTH CLAIM

22. Plaintiff, Timothy Noe, Administrator of the Estate of Michael J. D. Noe, deceased, incorporates and realleges paragraphs numbered one through nine of this Complaint and further alleges that this Plaintiff's decedent like Plaintiff, Casey D. Stengel, for all the reasons given in Paragraphs one through nine of the Complaint was deprived of rights, privileges and immunities secured to him by the Constitution and laws of the United States and particularly the right to equal protection of the laws and to due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

23. Plaintiff, Timothy Noe, Administrator, alleges that Michael J. D. Noe was unarmed and not guilty of any conduct or attack on any person during the incident heretofore described in this Complaint and that the killing of Michael J. D. Noe occurred because of drinking by Raymond L. Belcher and his intervention in a minor argument as heretofore described in the Complaint and Raymond L. Belcher's total panic when Plaintiff, Casey D. Stengel, intervened as heretofore described after the attack by Raymond L. Belcher as heretofore described in this Complaint.

24. Plaintiff, Timothy Noe, Administrator of the Estate of Michael J. D. Noe, alleges that the next of kin of Michael J. D. Noe have suffered pecuniary damages in the amount of THIRTY THOUSAND DOLLARS by reason of the wrongful death of Michael J. D. Noe as heretofore described.

25. WHEREFORE, Timothy Noe, Administrator of the Estate of Michael J. D. Noe, prays damages against defendants, Raymond L. Belcher, Dwight

Joseph and The City of Columbus in the amount of THIRTY THOUSAND DOLLARS and his costs in this Fifth Claim.

SIXTH CLAIM

26. Plaintiff, Timothy Noe, Administrator of the Estate of Michael J. D. Noe, incorporates and realleges paragraphs twelve, thirteen and fourteen of the Complaint as if fully rewritten herein and further states that conspiracy described by such incorporated and realleged paragraphs was entered into and continued with intent to deny the Estate of Michael J. D. Noe equal protection of the laws and due process of law and with intent to obstruct justice and thus defeat the wrongful death claim of the Estate of Michael J. D. Noe heretofore described.

27. WHEREFORE, Plaintiff, Timothy Noe, Administrator of the Estate of Michael J. D. Noe, prays damages against all the defendants named in this Complaint in the amount of TWENTY THOUSAND DOLLARS in this Sixth Claim and for his costs.

SEVENTH CLAIM

28. For a Seventh Claim the Plaintiff, Casey D. Stengel, incorporates and realleges paragraphs numbered one through twenty-seven of this Complaint as if fully rewritten herein.

29. Pursuant to the provisions of Rule 23 (c) (4), Federal Rules of Civil Procedure, Plaintiff, Casey D. Stengel, brings the Seventh Claim on behalf of himself and all the other citizens of the City of Columbus, Ohio, a class of approximately 539,700 persons. Joinder of all members of the class for this claim is impracticable. There are questions of law or fact common to the class.

30. Plaintiff alleges that the City of Columbus, Ohio, by police regulation, requires off-duty policemen to carry arms at all times based on the theory that police officers and the police chief are on duty 24 hours of each day.

31. As a result of said regulation, police officers of the City of Columbus carry concealed arms at all times even though said officers are not in uniform and are not identifiable to the public as police officers or as persons who are carrying lethal weapons.

32. During the regular eight hour tours of duty of Columbus police officers their conduct is governed by regulations about drinking, and many other regulations about conduct and associations outside their officials duties which do not apply during the sixteen hours of a day which are not within their regular tour of duty with the result that a large partially unregulated partially secret, but not an undercover or detective, police force is at large in the city with lethal weapons but without specific purpose of law enforcement at locations and at times and under conditions such as social drinking and rendezvous with members of the opposite sex which tend to impair the ability to exercise proper judgment and impair the ability to perform responsible and effective police work.

33. The aforesaid regulation requiring police officers to carry arms at all times seriously endangers the health, safety and welfare of the citizens of Columbus and endangers the constitutional rights of such citizens to due process of law and equal protection of the laws.

34. The aforesaid regulation exposes the citizens of Columbus to unnecessary danger by creating a situation whereby a citizen might incur serious bodily

harm by refusing to obey the order of an off-duty policeman who is not known to such a citizen to be an officer of the law.

35. The aforesaid regulation instills or tends to instill in the police officers of the City of Columbus a mental attitude of secretiveness, intrigue and authority that is contrary to the health, safety and welfare of the citizens of Columbus and creates an imminent danger to the life and liberty of such citizens and to their rights guaranteed by the United States Constitution.

36. WHEREFORE, Plaintiff, Casey D. Stengel, on behalf of himself as a citizen of Columbus, Ohio, and all other members of such class prays in this Seventh Claim that the City of Columbus, Ohio, and all other defendants herein be permanently enjoined from granting immunity to its police officers from the statutory law of Ohio which prohibits the carrying of concealed weapons when such officers are not in uniform or on a regular tour of duty in the nature of a plain clothes assignment or not performing ordinary and normal duties during the hours of full time, assigned and compensated duty and further prays that defendant, the City of Columbus, be permanently enjoined from enforcing the regulation authorizing its police officers to be armed at all times and authorizing said police officers to carry concealed weapons under color of law while engaged in personal activities.

DEMAND FOR JURY TRIAL

All Plaintiffs herein demand trial by jury of all claims in the Complaint to which they are entitled to a jury.

JOHN H. LEWIS
3316 North High Street
Columbus, Ohio 43202 263-0941
TRIAL Counsel

CLAYMAN, JAFFY & TAYLOR
21 East State Street
Columbus, Ohio 43215 228-6148

By CHARLES E. TAYLOR
Of Counsel

Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

MOTION OF DEFENDANT, RAYMOND L. BELCHER

Now comes the defendant, Raymond L. Belcher, and pursuant to Rule 12(B) of the Federal Rules of Civil Procedure, respectfully moves this Court to dismiss the action against him on the grounds that (1) the Court lacks jurisdiction over the subject matter and (2) the Complaint fails to state a claim against him upon which relief can be granted.

Respectfully submitted,

CITY OF COLUMBUS, Department of Law
JAMES J. HUGHES, JR., *City Attorney*

By DALE A. CRAWFORD
Trial Attorney

and ROBERT A. BELL
Associate Counsel

Attorneys for Defendant,
RAYMOND L. BELCHER
90 West Broad Street
Columbus, Ohio 43215
Phone: 461-5680

MEMORANDUM IN SUPPORT OF MOTION

Defendant, Raymond L. Belcher, has been joined in this action as an off-duty police officer who was allegedly involved in a shooting which caused the death of two plaintiffs and seriously injured a third.

Paragraph 8 of the plaintiffs' Complaint states in part as follows:

> ". . . Defendant Raymond L. Belcher, who was out of uniform and in no way identified as a Columbus policeman, and in no way involved in the minor dispute heretofore described, intervened by attacking one of plaintiff's decedent from the rear by grabbing him around the neck from the rear; said intervention by said Raymond L. Belcher being without any notification or attempt to notify anybody in the Cafe that he was an off-duty Columbus policeman and without any attempt by said Raymond L. Belcher to make a police arrest or a citizen's arrest of any kind. . ."

Plaintiffs seeks to acquire the jurisdiction of this Court pursuant to Section 1983 of 42 U.S.C.A., which states as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

To sustain an action against this defendant under 42 U.S.C.A. §1983, it is incumbent upon the plaintiffs to plead that the defendant was (1) acting under color

of state or local authority and (2) subjected the plaintiff, or caused the plaintiff to be subjected, to a deprivation of his rights guaranteed by the Constitution and the laws of the United States. (*Monroe v. Pape*, 365 U.S. 167 (1961), *York v. Story*, 324 F. 2d 450 (CA 9th, 1963), *Nugent v. Sheppard*, 318 F. Supp. 314 (DC ND Ind., 1970). Plaintiffs have failed to plead that the incident involving the alleged shooting was engaged in by the defendant Raymond L. Belcher while he was acting under color of state or local authority. Not only have plaintiffs failed to plead that the activities took place while defendant Raymond L. Belcher was acting under color of state or local authority, but in the alternative, plaintiffs have affirmatively pleaded that Raymond L. Belcher was *not* acting under color of state or local authority. The Court in *Nugent v. Sheppard*, 318 F. Supp. 314, 316-317 (DC ND Ind., 1970) stated as follows:

> "This is not to say that an assault is automatically transmuted into a violation of Constitutional rights simply because the guilty party is a policeman. Obviously a policeman can act in a private, as well as a professional capacity. But when the assault occurs 'in the line of duty'—when the sole relationship between the person guilty of the assault and his victim is the relationship between policeman and citizen — the act is something more than a 'mere' assault."

The District Court in *United States ex rel., Smith v. Heil*, 308 F. Supp. 1063 (DC ED Pa., 1970) was presented with a Civil Rights complaint against two officers who were in plainclothes riding in an unmarked car who purportedly engaged in an unlawful arrest of a parolee. The defendants sought to dismiss the complaint because they were not acting under color of

state law within the meaning of Section 1983 of 42 U.S.C.A. The Court stated at page 1065 of 308 F. Supp. as follows:

> "If Stufflet [the defendant police officer] were acting wholly as a private citizen in this alleged assault, and did not use the 'pretense' of his office's legal authority . . . or act under the authority of a policeman's badge' . . . the Civil Rights Act would not provide plaintiff with a vehicle for recovery . . . however, we think that here, plaintiff's allegations that the defendant 'police officers' did in fact purport to 'arrest' him to state a sufficient factual nexus with the requirement of action 'under color' of state law, namely, that the defendants asserted a lawful authority to use force to take plaintiff into custody."

In the case at bar, plaintiffs have pleaded that the defendant, Raymond L. Belcher, was (1) an off-duty police officer (which by definition would purport to mean that at the time he was not engaged in the performance of his duty); (2) that Raymond L. Belcher did not seek to identify himself as a police officer, and (3) that Raymond L. Belcher did not seek to make an arrest at the time of the alleged shooting. (Complaint, ¶8) The arrest of the plaintiff Stengel took place after the alleged shooting (as a result of the incident—not as a cause) by another officer pursuant to an affidavit filed with the Franklin County Municipal Court and not by the defendant, Raymond L. Belcher.

Thus, defendant respectfully submits that the plaintiffs have failed to plead that the alleged shooting by the defendant Raymond L. Belcher, took place under color of state or local authority, and failing in such regard, have not pleaded a necessary requirement to invoke the jurisdiction of this Court under 42 U.S.C.A.

§1983. The Complaint should thus be dismissed against this defendant because (1) the Court lacks jurisdiction over the subject matter and (2) the Complaint fails to state a claim against this defendant upon which relief can be granted.

Respectfully submitted,

CITY OF COLUMBUS, Department of Law
JAMES J. HUGHES, JR., *City Attorney*

By DALE *A.* CRAWFORD
Trial Attorney

and ROBERT A. BELL
Associate Counsel

Attorneys for Defendant,
RAYMOND L. BELCHER

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
Eastern Division
Civil Action 72-67

CASEY D. STENGEL, et al,
Plaintiffs

vs.

RAYMOND L. BELCHER, et al,
Defendants

OPINION AND ORDER

This matter is before the Court on defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted and for lack of jurisdiction over the subject matter.

The twenty-five defendants in this action have filed five separate but related motions.

1. A motion by defendant Raymond Belcher to dismiss the complaint as to him because the Court lacks jurisdiction over the subject matter and because the complaint fails to state a claim against him upon which relief can be granted.
2. A motion by defendant Dwight Joseph to dismiss the action as to him because the Court lacks jurisdiction over the subject matter and because the complaint fails to state a claim against him upon which relief can be granted.
3. A motion by defendant City of Columbus to dismiss the action against it because the Court lacks jurisdiction over the subject matter and because the complaint fails to state a claim against it upon which relief can be granted.

4. A motion on behalf of the twelve John Doe defendants to dismiss the action as to them because the Court lacks jurisdiction over the subject matter and over the person and because the complaint fails to state a claim against them upon which relief can be granted.
5. A motion on behalf of the ten remaining defendants to dismiss the action as to them because the Court lacks jurisdiction over the subject matter and because the complaint fails to state a claim upon which relief can be granted.

This action was commenced under the provisions of Title 42, United States Code, Sections 1983 and 1985. Jurisdiction of the Court is invoked under Title 42, United States Code, Sections 1331 and 1343.

Plaintiff Stengel contends that he was assaulted by defendant Raymond Belcher during a barroom altercation and, as a result of that assault, was paralyzed. The two other plaintiffs were killed. Plaintiffs contend that the remaining defendants conspired to cover up the incident. Defendant Raymond Belcher is a police officer for the City of Columbus. However, he was not officially on duty at the time the assault occurred. The remaining defendants are police officers and supervisory personnel of the Columbus Police Department.

Each of the defendants' motions will be considered separately.

1.

Section 1983 provides that any person who while acting under the color of state law deprives another of any right, privilege or immunity secured by the Constitution or laws of the United States shall be liable to the injured party. Therefore, plaintiffs must

both allege and prove that defendants were acting under color of state law. Defendant Raymond Belcher contends that the complaint should be dismissed as to him because he was not acting under color of state law at the time of the assault.

The Court has carefully examined the allegations in the complaint. The complaint does allege that defendant Raymond Belcher was acting under color of state law. Defendant Belcher contends that since he was not technically on duty when the assault occurred he could not have been acting under the color of state law. However, this is not necessarily true. *See Johnson v. Hackett*, 284 F. Supp. 933 (E.D. Pa. 1968).

Whether or not plaintiff will be able to prove that defendant Raymond Belcher was acting under color of state law is not at issue here. Rather, the motions filed on behalf of this defendant attack the sufficiency of the allegations in the complaint. Viewing the allegations in the complaint in the light most favorable to plaintiff, the Court determines that they are sufficient to withstand a motion to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.

WHEREUPON, the Court determines that this motion is without merit and it is therefore DENIED.

2.

Defendant Joseph contends that this Court does not have jurisdiction over the subject matter because defendant Raymond Belcher was not acting under the color of state law. However, as noted above, this argument is without merit. Defendant Joseph also contends that the complaint fails to state a claim upon which relief can be granted against him because he cannot

be held liable under the theory of respondeat superior in a §1983 action. There are a number of cases which have adopted this position. *See, e.g., Jordan v. Kelly*, 223 F. Supp. 731 (W.D. Mo. 1963). However, the complaint in this action also alleges that defendant Joseph participated in the conspiracy to cover up this incident. Therefore, the Court believes that he should not be dismissed as a party to this action.

WHEREUPON, the Court determines that the motion is without merit and is therefore DENIED.

3.

The City of Columbus contends that since it is not a "person" within the meaning of Section 1983, then it cannot be made a party to this action. In *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court held that in an action for money damages a municipal corporation is not a "person" within the meaning of Section 1983. To this extent, the motion by the City of Columbus is meritorious. However, plaintiffs also seek injunctive relief against the City of Columbus. Plaintiffs seek to enjoin enforcement of a regulation of the Columbus Police Department which requires all off duty officers to carry firearms. This Court does not interpret *Monroe v. Pape, supra*, to bar an action against a city for injunctive relief. *See* C. Antieau, Federal Civil Rights Acts §37 (1971).

WHEREUPON, the Court determines that the motion is without merit and it is therefore DENIED.

4.

The fourth defense motion is a motion on behalf of the twelve John Doe defendants to dismiss the complaint as to them. The complaint alleges that these

defendants participated in the conspiracy to cover up the incident. For the reasons stated elsewhere in this opinion, the Court believes that the allegations in the complaint are sufficient to withstand a motion to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted. However, these defendants also contend that the complaint should be dismissed as to them for insufficiency of service of process.

The Court notes that these defendants have not been served with process because their real identity has not yet been determined. Therefore, the Court will reserve a ruling on this motion until after the completion of discovery.

5.

The last defense motion to dismiss which was submitted by the ten remaining defendants who allegedly participated in the conspiracy to cover up the incident asserts that this Court lacks jurisdiction over the subject matter because defendant Raymond Belcher was not acting under the color of state law at the time of the assault. However, as noted above, this argument is without merit. Defendants further contend that the complaint fails to allege sufficient facts to establish a conspiracy under §1983. The complaint alleges that these defendants attempted to whitewash the incident by filing unfounded charges against plaintiff Stengel, intimidating witnesses, failing to immediately examine defendant Raymond Belcher for intoxication, releasing inaccurate stories to the news media and other actions designed to cover up the incident. While these activities would not be sufficient to sustain a claim for relief under 42 U.S.C. §1985 in that plaintiff has not alleged that the discrimination was class based,

see Griffin v. *Breckenridge*, 403 U.S. 88, 102 (1971), the Court does believe that the allegations in the complaint state a claim for relief under §1983. *See Mizell* v. *North Broward Hospital District*, 427 F. 2d 468 (5th Cir. 1970).

WHEREFORE, the Court determines that this motion is without merit and it is therefore DENIED.

JOSEPH P. KINNEARY
Chief Judge
United States District Court

Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

ANSWER OF ALL DEFENDANTS

Now come the defendants, Raymond L. Belcher, Dwight Joseph, John Hawk, Francis B. Smith, Robert Taylor, Richard O. Born, Earl Belcher, Detective Sergeant P. Hopkins, James Newell, E. R. Woods, E. Young, M. Hardin, John Does 1-12, and City of Columbus, Ohio, and for their answer state as follows:

First Defense

1. Admit the allegations contained in paragraphs 4, 7, 30 and 31, of the plaintiffs' complaint.

2. Deny for want of knowledge the allegations contained in paragraph 3 of plaintiffs' complaint.

3. Deny the allegations set forth in paragraphs 1-36 of plaintiffs' complaint not previously admitted or denied for want of knowledge.

Second Defense

4. The Court lacks jurisdiction over the subject matter set forth in plaintiffs' complaint.

Third Defense

5. The Court lacks jurisdiction over the person of each and every defendant.

Fourth Defense

6. The Court lacks jurisdiction over the persons of John Does 1-12 because of the insufficiency of the service of process upon said defendants.

Fifth Defense

7. The complaint fails to state a claim against the defendants upon which relief can be granted.

WHEREFORE, defendants demand that they be dismissed from this action; that judgment be rendered in their favor, and that costs of this action be taxed to the plaintiffs.

Respectfully submitted,

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Trial Attorney
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90 West Broad St.
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Phone: 614/461-7385

ROBERT A. BELL
Of Counsel

(Certificate of Service omitted in printing)

Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

PRE-TRIAL STATEMENT OF ISSUES

Pursuant to this Court's request of June 15, 1973, defendants hereby submit a pre-trial statement of the issues as follows:

1. Were the defendants, each and everyone of them, acting under color of state or local law at the time of the incident alleged in the complaint?

2. Did the Court have jurisdiction over the person of John Does 1-12?

3. Was there a conspiracy on behalf of the defendants to deprive plaintiffs of their civil rights?

4. Did the defendant, Raymond L. Belcher, use force against the plaintiffs in self defense?

5. Should the Court enjoin the defendant, City of Columbus, from enforcing an internal rule of the Columbus Police Department which requires off-duty police officers to carry weapons?

6. Were any of the defendants frivolously joined in this suit by the plaintiffs so as to award to such defendants attorney's fees?

7. The issues which were raised in the defendants' motions to dismiss with respect to the jurisdiction of this Court under 42 U.S.C.A., Section 1983 have been

ruled on by this Court, but for purposes of this statement, are to be considered issues still pending before this Court.

Respectfully submitted,

DALE A. CRAWFORD
Trial Attorney
(address omitted in printing)

(Certificate of Service omitted in printing)

Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division

(Title omitted in printing)

TESTIMONY OF CASEY STENGEL

[p. 160]

CASEY STENGEL

called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Lewis:

Q. Will you state your name, please. A. Casey Dennis Stengel.

Q. Where do you live, Mr. Stengel?

The Court: You don't have to give the street address. What street do you live on? A. All of a sudden my memory is blank.

Q. (By Mr. Lewis) Is it Agler Road? A. 1900 Agler Road.

Q. You are one of the plaintiffs in this case? A. Yes, sir.

Q. What is your present age? A. Twenty-four — 25.

Q. What is your present age? A. Twenty-five.

Q. On March 1, 1971, what was your age? A. Twenty-two.

Q. On March 1 or February 28, 1971, where did you reside, Mr. Stengel? A. 422 East Lane Avenue, Apartment C.

Q. What was your occupation at that time, if any? [p. 161] A. I was unemployed and enrolled to start at Ohio State University that month in March, spring quarter.

Q. Previous, immediately previous to that time, what had been your employment? A. I was a mail clerk for the U. S. Post Office.

Q. Calling your attention to the late evening of February 28 and the early morning of March 1, 1971, who were your companions at that period of time? A. Well, first Michael Noe came over to my house — my father was there — and then Robert Ruff came over to fix my father's car and left, and then Robert Ruff returned and Dave Jarvis came over.

Q. Are any of these people related to you? A. Robert Ruff is or was my uncle.

Q. That relationship is as an uncle, is through what, your father or your mother? A. My mother.

Q. How old was Robert Ruff at that time? A. Twenty-one.

Q. These individuals met at the residence you were living at and left there at some time? A. Yes.

Q. Do you know approximately what time? A. It was around 11:00 o'clock P.M.

Q. Generally, without going into details, state where you [p. 161A] went, what you did, before you arrived at Jimmie's Cafe which you have heretofore heard evidence or, of course, you know about is the scene of the incident that gives rise to this lawsuit. State generally and briefly what you did. A. We all left; Dave Jarvis, Robert Ruff, Michael Noe and myself.

Q. How many automobiles? A. Two cars.

Q. Go ahead. A. We went to a little tavern on Cleveland Avenue. We had a beer. We left there. We went

to a bar on Hudson Street. We shot a game of bumper pool for a beer. Then we were going to Oldfield's but we decided to go to Jimmie's after Dave Jarvis departed at that time, and Bob Ruff and Michael Noe and myself all went to Jimmie's Cafe.

Q. What day of the week was February 28th? A. Sunday.

Q. What style liquor, what kind of liquor was available up until midnight Sunday? A. Only 3.2 beer.

Q. Did you have anything to drink, any other kind up until that time? A. No, sir.

Q. Any place? A. Other than the beer? [p. 162]

Q. Yes. A. No, sir.

Q. Approximately what time did you arrive at Jimmie's Cafe. A. It would have been around 1:00 o'clock.

Q. How far is this located from your home where you were living at that time? A. Approximately ten blocks.

Q. What kind of a section is it in? A. It is in the Ohio State campus area.

Q. Who were the individuals that were with you when you entered Jimmie's Cafe? A. Robert Ruff and Michael Noe.

Q. Was Jarvis with you at that time? A. No, sir.

Q. As you entered Jimmie's Cafe, did you see anybody in there that you recognized? A. One female by the name of Agnes Morgan. Yes, Agnes Morgan.

Q. How old a lady was she, approximately? A. I would say around 45.

Q. Was she a large or small woman? A. She was a fairly large woman.

Q. At that time did you start a conversation with her, or any one that was with her. [p. 163] A. Yes. We had all known her. She was known to all three

of us and she introduced her husband to us, Kyle Morgan.

Q. He was with her at that time? A. Yes, sir.

Q. Mr. Stengel, I would like to have you look at the chart of the diagram in front of you that has been previously referred to in the course of this trial, the diagram in front of you, and tell us generally whether that appears to be a reasonably accurate and proportionate representation of the layout of Jimmie's Cafe as you recall it? A. Yes, sir.

Q. There are illustrations — there are items marked on that diagram that would seem to indicate a front bar, bar close to the entrance, and a smaller bar behind it. There is some booths, piano, bowling machine and some tables and a juke box at the left hand of the picture.

Do those appear to be reasonably accurate and proportionate in the — proportionate representations of the scene at that time, as you recall it? A. Yes, sir, except I never paid too much attention to this area here (indicating.)

Q. By that you are referring to the south? A. To the south side where the people sit at these tables.

Q. Casey, with that background in mind, that introduction, would you go ahead and, in your own words, state clearly and [p. 164] distinctly to the Court and jury, to the best of your recollection, what occurred from that time forward and I will add a question here and there as it may seem appropriate.

What happened after you were introduced to Agnes —after you met Agnes Morgan and her husband, Kyle Morgan? A. We ordered a beer and we got to talking. Somebody suggested — I don't know which one, which party, one of us or one of them — that we would bowl for a beer on the bowling machine.

Q. Had you previously at any time bowled, been in a bowling game with Mrs. Morgan? A. Yes, sir, about half a dozen times or more.

Q. Had you ever met her husband previous to this time? A. No, this was the first time.

Q. Go ahead. What next occurred, to the best of your recollection? A. Michael Noe and myself teamed up and Agnes Morgan and her husband teamed up and we bowled one game on the machine for a beer and we lost that game so I bought them a beer.

So, we went for a second game and we lost again and I bought them each another beer.

Q. What was Robert Ruff involved in — Was he involved in these contests? A. No. He was sitting at the bar, approximately right around in here, (indicating.) [p. 165]

Q. By that you are indicating the third stool back from the front on the larger bar; is that correct? A. Yes, sir.

Q. That is approximately across from the sketch where it shows the piano; is that correct? A. Yes, sir.

Q. Go ahead. A. After the second game we asked — nobody had any more dimes in their party or our party and I asked the barmaid if she had any more dimes for some change.

At that point she said she did not have any more dimes; that she was out.

Michael Noe went over to here (indicating.)

Q. By here you are referring to the middle booth on the north side? A. Yes, sir. There was four people in the booth and the only one I really paid any attention to in that booth was the barmaid because she would come out, sit down and sit here (indicating.)

Q. There was a lady that worked there that had been sitting in this middle booth? A. Yes, she would come back and forth.

Q. Did you know her name at that time? A. No, sir.

Q. How many people were sitting in that middle booth? [p. 166] A. There were four people.

Q. Did you know any of them? A. No.

Q. Do you have any recollection of ever seeing any of them before that time? A. No, sir.

Q. Go ahead. What happened? A. Michael Noe came back and stated that nobody in the second booth had any dimes, so at that time we quit bowling and I sat down, was still drinking my beer and Michael Noe had a conversation somewhere.

Q. Where you sat down was in relation to Robert Ruff, was where? A. I was to the east side of Robert Ruff and he was one stool over from me. He might have been the second booth. I was in the fourth booth.

Q. Do you mean booth? A. Stool, bar stool.

Q. Therefore at that moment you were sitting to the best of your recollection about the fourth stool from the west end of the larger bar; is that correct? A. Yes, sir.

Q. Your uncle, Robert Ruff, was sitting at the second or third stool from the west end of the larger bar as you recollected; is that what you are saying? [p. 167] A. Yes, sir.

Q. Where was Michael Noe at that time? A. At that time the Morgans had seated themselves somewhere around in here (indicating.)

Q. By that you are meaning to the east of you? A. Yes.

Q. Away from the entrance and opposite — A. The bowling machine.

Q. All right. Continue. A. Michael Noe was standing up talking to them.

Q. Where was he standing in relation to the bowling machine? A. Just about right across from the bowling machine talking to the Morgans.

Q. Were you looking at him or did you see what was happening? A. I just noticed he was talking to them. I didn't pay any attention. I was facing towards the west talking to my uncle Robert Ruff.

Q. Now, state what happened next to the best of your recollection. A. As we were sitting there talking, we were discussing about going home, finishing the beer and going home. At that time I heard a disturbance behind me. I didn't see how the disturbance started but at that point my uncle got up and came around and I turned around and saw Mike and Agnes [p. 168] holding onto each other and then Kyle was behind Michael Noe so that he was sort of in the middle.

Robert Ruff, they were holding and grabbing each other, Robert Ruff pulled Agnes Morgan away from Mike and pushed her over to the piano and held her against the piano over here (indicating.)

Q. What did he appear to be doing at that time? A. He was separating Agnes Morgan from Michael Noe and Kyle Morgan who were also holding onto each other.

Q. What did you next observe? A. I started to go towards Kyle Morgan and Michael Noe. As I was turned around now, facing north, still half in the barstool and half out, as I started to move, I had a slight odor of some type of tear gas in the air but it wasn't very heavy at that particular time.

I noticed a man jumping on or holding onto Robert Ruff's back, had his right arm around his neck and had his left arm around his waist.

Q. Where were these two individuals at that time? A. There was three of them. Bob was holding Agnes against the piano; this other man was on my uncle's back; had him from behind.

Q. What did you next do? A. I grabbed the gentleman off of my uncle and I pushed him down, pulled him down to the floor over in this area [p. 169] here (indicating.)

Q. By that you are indicating the area just to the east of the larger bar or west of the larger bar; is that correct? A. Yes, sir.

Q. All right. Continue. A. I pulled him down, and on the way down he was continually spraying tear gas into my face.

Q. Was that at close range? A. Yes, sir.

Q. All right. Go ahead. What happened next? A. I got him down on his back and then the tear gas was getting in my face so I stood up. I had him laying down on the floor on his back and I took about two or three kicks at his hand trying to knock the gas or tear gas, whatever he was spraying, out of his hand.

Q. What did you remember observing about where the tear gas was or the can was at that time? A. It seemed like he had it in his left hand over him; me laying on the floor over him like and he spraying upwards towards me.

Q. What did you do next? A. I tilted my head a little bit away from the tear gas and tried to look at him, but keep my eyes out of the way of the tear gas, and I took a few kicks at the can, and whether I kicked it out or it fell or dropped out or what, anyway it [p. 170] stopped.

Q. By this time had Mr. Ruff done anything? A. I noticed — I didn't see him come over but I noticed that Mr. Ruff was standing approximately just by the door, the outside of the door, on the other side of Raymond Belcher.

Q. Did you observe him do anything in connection with Raymond Belcher, touch him in any way or any activity between them? A. No, sir, he was just standing there at that time. I noticed him. He was standing there doing nothing at that time but standing.

Q. Where at that time was the gentleman that had been on you described — had intervened in the argument and pulled the man down or intervened on the back of your uncle; where was he? A. I had him still laying on the floor on his back.

Q. What did you next do? A. I turned around then when I saw my uncle standing there, I figured my uncle could hold the situation here, so I turned around to concentrate back, find out what was going on between the Morgans and Michael Noe, and to see if anybody else was having any involvement over in this area.

Q. What next happened? A. I turned but I never got a chance to see what was going on because as I was turning I heard one shot go off, [p. 171] but by then I had my back to it and the bullet attracted my attention, but before I could turn back around to see what was going on, I got shot in the back and I fell to the floor.

Q. How many shots did you hear altogether at that time? A. Two shots.

Q. Would you describe generally what part of your anatomy the bullet entered your back? A. It entered my back approximately — well, entering it was above the belt on the right side of my back and went upward

to about the center of my back and it stopped in my spine.

Q. How long a period of time, your best estimation, did this whole incident cover up to this point from the time of the difficulty with Noe and Agnes to the shooting? A. It was under a minute, less than a minute, that everything so far that had happened.

Q. Go ahead and state what you recollect happened next. A. I landed on my back; I spun; my legs crossed over each other and was laying on my back when I landed on the floor, so I never got to still look over in this direction.

Q. On that diagram do the two figures there, are they a reasonably accurate representation of where you recollect your body came to rest? A. When I first hit the floor, this is about where I[p. 172] came to rest.

Q. You are indicating the figure as between the two figures on that chart? A. The one furthest.

Q. The one furthest from the door and closest to the larger bar; is that correct? A. East, yes, sir.

Q. As you recollect the situation at that time, is that a reasonably accurate representation of where you saw another body? A. Yes. Robert Ruff, he was more, I believe, straighter toward the north and south but he was reasonably situated like that.

Q. Were you ever unconscious at any time after this shooting? A. No. When I hit the floor, I rolled over on my stomach and I crawled — well, when I rolled over on my stomach, I heard somebody, it was a man, make a statement about somebody is running or run and catch him, something to the effect that he is running away.

At that time I thought was they meant the guy that shot me was running away.

Mr. Crawford: I object, Your Honor.

The Court: Overruled.

Q. (By Mr. Lewis) Go ahead. [p. 173] A. I saw the back of a man. I could not tell who this man was, going out the door but I know it wasn't Michael Noe because Michael Noe wasn't in the bar.

I then crawled over a little bit to my uncle, trying to see what his condition was. I asked him how he was. At that time he was mostly just gasping for air and breathing heavily.

Q. Had you had experience in connecting with shootings and guns? A. Yes, I took classes in tear gas while I was in the service and I was a sniper and a point man over in Vietnam and I was familiar with the fact of getting shot and remaining calm and not to get excited or go into shock or let the bleeding speed up or anything.

Q. How long were you in combat service in Vietnam? A. I spent one year from —

Mr. Crawford: Your Honor, may we approach the bench, please?

The Court: Yes.

(Discussion off the record followed.)

Q. (By Mr. Lewis) Mr. Stengel, in your service in Vietnam, had you received a decoration known as the Purple Heart? A. Yes, sir.

Q. Did that involve injuries sustained in the service? [p. 174] A. Yes, I got hit by a mortar.

Q. Was that a major or a minor injury? A. It was a minor injury. It didn't damage me in any way that I couldn't become healthy again after I got hurt.

Q. Therefore you had some experience and familiarity with injury of this general nature; is that correct? A. Yes. The people next to me would die and I seen other people dying or laying there.

Q. Now, go ahead and describe your best recollec-

tion of what you observed next that occurred. A. I was paying attention to my uncle and he could not respond to me and Agnes Morgan and Kyle Morgan were standing here (indicating.)

Q. You are now pointing to what area, describe it. A. In front of the booth that originally Raymond Belcher and the barmaid and the four people had been sitting. She was screaming more or less hysterical and Kyle was trying to calm her down.

Q. Were both of these — were they upright at that time? A. They were both standing but she said her back hurt her and I suggested that for him to let her sit in the booth. My back, I felt like a balloon from my waist down. I was bloated up and I wasn't sure what I was hit with.

Q. Who else did you observe in the immediate scene at that time? [p. 175] A. I also noticed the barmaid was standing behind the bar facing towards Summit Street and a man going out the front door or standing in the front door.

Q. Go on. After the immediate incident, what do you remember occurred to the best of your recollection? A. I was laying there, I couldn't get any response from my uncle, so I remained calm, got up. I put myself on my elbows; however I was instantly paralyzed. I only crawled a little ways over to my uncle.

I observed everything that was in the bar; Agnes and Kyle Morgan. I will retract everything.

I didn't know where Mr. Compson was but I saw Agnes and Kyle. I saw the barmaid behind the bar facing right at me.

Q. At that time— A. And a man standing in front of the door.

Q. At that time did you know who that man standing in the door was or his name? A. No, sir.

Q. Have you later learned the names of some of these individuals? A. Yes.

Q. Go ahead and state what you next recollect happened after the immediate incident. A. I never saw Mike any more. [p. 176]

Q. Did you see him at all after the time you were shot? A. No, sir, I never saw him from the time I grabbed Raymond Belcher, put him on the floor, I had not noticed him any other time after that.

Q. What did you next observe? A. I next observed the people in the bar, what they were doing. Police officers coming in the bar. I would say generally around four or five, or I don't know in what order they came in, but pretty soon, being a little bar, they were practically just walking all around there.

Q. Do you have an estimation of how much time elapsed between the time you were shot and the arrival of the police officers? A. It was about five, ten minutes.

Q. Go ahead. What next happened? A. Well, eventually somebody came in and put Robert Ruff on a stretcher.

Q. How much time after the arrival of the police officers would you estimate elapsed before he was put on a stretcher? A. I would say perhaps five minutes or something like that.

Q. Go ahead. A. They were getting ready to take him out. I was concerned about myself, but I was also concerned about my uncle so I asked if they could take me also. They told me at that time they didn't have enough room, so I laid in the bar on [p. 177] the floor and they took my uncle out.

Q. What hapepned. Go ahead. A. Some officers were standing around the bar and nobody was asking me any questions or paying any attention to me, so finally I tugged on one of the officer's pant legs so I felt my

back and felt a hole in my back, but I didn't really want to think that I was shot with a gun. It felt like a tranquilizer or something.

My legs and everything just felt like a balloon. I just didn't feel like I was shot with a bullet. Finally I tugged on one of the officer's pants legs in about this vicinity where the action had taken place across from the middle booth, and I asked the officer at the time if I had been shot with a gun.

At this point he raised my coat shirt up, "Yes, you are shot," and that was all that was ever said to me.

Q. What happened next? A. I laid there for, to me it seemed like a long, long time, but I know I laid there for another five minutes, I would assume, or longer, and I finally got tired and kind of impatient of laying on this floor. I didn't know what my condition was, and finally got to dawning on me that I might die and I — if I was gonna die, I didn't feel like dying on a barroom floor, so I asked the barmaid if they wasn't gonna get me an ambulance, would she at least [p. 178] call my father and have him come down and pick me up and take me to the hospital.

Q. What happened next? Did you get some assistance? A. Eventually they brought a stretcher in and they had it laying right over here (indicating.) I had crawled — my head was now facing this way, but I was crawling over towards my uncle earlier, as I stated, to see about his condition. I know he was hit in the chest.

I finally — he laid it on the floor and I crawled up on the stretcher. They still weren't giving me hardly any assistance. In fact I asked them to at least put my legs up. I told them I couldn't move my legs on the stretcher too and I was face down laying on my chest on the stretcher.

At that time they carried me out, feet first, and I couldn't see what they were putting me in, but I knew it wasn't an ambulance, a regular hospital ambulance.

When they put me in the back of this — I don't know whether it was a paddywagon, is what I thought it was — they put me in feet first and I wouldn't fit so they shuffled me around a litle bit, they jerked me about half way out and pushed me back in again, tried to get me to fit, so the second time I managed to fit so they slammed the doors.

Then they started proceeding to take me to a hospital which I assumed that is where they were taking me, they put me in there. Well, it got harder and harder for me to [p. 179] breathe and I wanted to stay conscious. I was in fear that if I did go unconscious, that I wouldn't be able to control my body bleeding or anything else.

Q. Was there someone with you in this vehicle? A. There was somebody sitting, yes, the vehicle was parked here (indicating), this is the front sidewalk. The vehicle was parked here facing this way (indicating.) This is a one-way street going south.

I told at that point after a little while being in there, I mentioned that it was getting harder and harder for me to breathe. I was trying to stay conscious.

I heard a voice of the guy, of a man which I did not see but my face was right up against the doors, and he said, "You will be all right," or "You are all right," and that was the only comments made.

Shortly after that I must have passed out because when I came to, I was laying on my back in Riverside Hospital.

Q. What do you next remember seeing and observ-

ing? A. I woke up, my eyes opened up and I was laying in a hospital. I noticed two police officers standing on the right side of me. They started advising me of my rights. I told them that I had a bullet in me and that when they got the bullet out of me, that I would tell them what they wanted to know.

I didn't know who shot me or anything, or whether it [p. 180] was an officer or anything else, but I told them I wanted the bullet out of me. That was my primary concern of getting the bullet out of me and to save me; then I would tell them what they wanted to know.

Q. What do you next recollect occurred? A. They never harrassed me at any time at that point. They simply left. I laid there and finally my father showed up.

Q. Were you getting any emergency treatment by way of sedatives at that time; do you remember? A. No, I wasn't getting anything.

Q. Go ahead. A. I was just laying there. The pain was now mounting up greater. My father came in and I was trying to ask him what hapepned to Bob and Mike. I said I think Bob and Mike are shot too, which I knew Bob was shot.

I asked about Bob and Mike and he didn't know anything about it.

So then I kept asking for a shot or something, or some kind of medication, a shot of something for the pain.

[p. 238]

CROSS EXAMINATION

Q. This was a Sunday? A. Yes, sir.

Q. Anybody have anything to drink at your place that evening? A. Not that I know of. I didn't have anything and I didn't see anybody else drink.

Q. If you would, I think you did state to Mr. Lewis in tracing your steps, and he asked you to briefly trace your steps that night, you alluded to going to two bars on direct examination.

Could you go back over that and tell me how many bars did you go to that night? A. Go inside, bars we went inside?

Q. Go inside. A. Counting Jimmie's cafe?

Q. Yes. A. Three.

Q. What was the first bar you went to? A. I don't know the name of it.

Q. Where was that? A. Cleveland Avenue.

Q. Do you know where on Cleveland? [p. 239] A. Near Minnesota.

Q. Is that Jim and Etta's Bar? A. I don't know.

Q. Did you have anything to drink there? A. We drank a beer.

Q. Did you drink a beer? A. Yes, sir.

Q. Did everybody have a beer? A. Yes.

Q. Only one? A. Yes.

Q. So that was the first thing you had had to drink all day? A. Yes.

Q. About what time was that; do you recall? A. Around 11:00, we left around 11:00. We might have left maybe ten til 11 or ten after 11; however long it took to leave my house to get up there. We had a beer then.

Q. Do you recall how long you stayed there? A. About 20 minutes I suppose, 20 to 30 minutes at the longest.

Q. Had anything happened there that you can recall? A. Drank a beer, no, sir, nothing spectacular happened as far as anything.

Q. What did happen, if you can recall? What did you do [p. 240] there in the bar? A. We drank a beer.

Q. Anything else? A. Talked to some of the patrons.

Q. Do you remember who these patrons were? A. No.

Q. Were there any patrons playing pool? A. Yes.

Q. Did you talk with them? A. Yes.

Q. Did Mike talk with them? A. Yes.

Q. Do you remember any of the conversation you may have had? A. Just they wanted to know if we wanted to shoot some pool.

Q. What was the response? A. Mike wanted to but they wanted it—it was for money and Mike wanted to and we talked him out of it.

First of all, he wasn't that good of a pool shooter and he never carried any money hardly with him anyway. To him if he had lost a dollar, it would have been like losing a million bucks, so he wasn't driving. He didn't have much choice but to leave with us.

Q. Did you all leave? [p. 241] A. Yes.

Q. Did you carry your beers out or did you finish them there? A. We drank them right there.

Q. Did you have any conversation with anybody outside the bar? A. One of the players at the pool table still made some remark about playing pool. Mike said he was a better pool player than the other pool player, but it was a—she or a he, I don't know which one. There was a girl and guy on the table—still asked about shooting pool and I said well we were leaving so there was nothing else, nowhere else to go and he said might as well go back inside. I said we are not gonna shoot pool. We are leaving and Mike had to leave because, like I said, he wasn't driving. The other three of us wanted to go.

Q. So, you all left of your own free will to go some place else; is that correct? A. Yes.

Q. Do you recall where you went from there? A. Went to a little tavern on Hudson Street.

Q. By the way, what were you looking for that night; Do you recall what you were looking for, if anything, when you were out? A. People we might know, have a drink. We were all four together, good conversation between ourselves, drinking [p. 242] beer and talking, same thing anybody would do if they went out.

Q. Haven't you testified at one time that you were looking for girls. A. Girls. I also testified guys. I also testified friends, couples. I finally did find a girl, Agnes Morgan.

Q. You went to this bar on Hudson. Did you go in there? A. Yes, we did.

Q. Do you know what you did? A. Yes, we shot a game of bumper pool, the four of us; two of us against the other two, to see who was gonna buy the beer.

Q. How long did you stay there? A. We played a game. We drank the beer. We were there for awhile. The game was pretty slow. We were in no big rush to go anywhere so I don't know, after midnight, I suppose, we left there.

Q. You left after midnight? A. Around in there somewhere. I don't really keep track of time. I knew the bars were gonna be closing fairly soon. That's the only reason I was trying to look at the clock then, but at that particular bar I didn't check.

Q. Did you have anything to drink there? A. Yes, we all had a beer.

Q. Where did you go from there? [p. 243] A. We went to the Ranch. That's another little tavern over on Summit Street and they usually have a band there and everything but there was nothing there on a Sunday

night, no bands, few people drinking, and we didn't feel like going in there.

Q. Why didn't you want to go in there? A. Because we just didn't feel like going in, so there was another little place down there and thought, well, about four doors down, we thought since we are standing here, look it over. I don't know if we all went in or one of us or two of us.

The Court: Casey, I don't want to interrupt your testimony but sitting here and listening closely, I can't hear what you are saying so you are going to have to keep your voice up. (Admonition.)

Q. (By Mr. Crawford) After you left the Ranch, where did you go? A. Went to another little bar about four doors down from the Ranch. We looked in and decided we didn't feel like going in. It was a small place and we left. There might have been one guy drinking a beer and we just decided to go on. We wanted to get closer to the campus.

Q. Where did you go after that? A. Went to Oldfield's, a little tavern out by the Luv-a go-go. That was closed; Oldfield's was open. At this point [p. 244] that's where I went.

Q. Did you go into Oldfield's? A. No.

Q. Do you recall what time you got to Jimmie's? A. When we got there it was around between 1:00 and 1:30 by the time we finally got there.

Q. How did you get there; what cars did you go in? A. To Jimime's?

Q. Yes. A. I went in—I took my car. I drove.

Q. Had you all been in your car before? A. No.

Q. There were four of you when you got to Oldfield's right? A. Yes.

Q. You had taken two cars there? A. Yes.

Q. Do you recall why you took two cars or couldn't you all fit in one? A. I think four people can fit in a car. I drove my car because I wanted to drive my car, and Dave Jarvis had his car and he wanted to drive his.

Q. When you first arrived at Jimmie's, do you know how many people you saw there when you first arrived? A. I can count them; a half dozen, around in there. [p. 245]

Q. Do you know if there was anybody sitting in the second booth, the one you said that Officer Belcher was in when you arrived? A. I never noticed.

Q. When you got there, you said that you went in and sat down at the bar. Did you order anything to drink? A. Yes, we ordered a beer.

Q. Then when did you start bowling on the bowling machine? A. We started talking for a while to the Morgans and we played the juke box and we started bowling.

Q. Pardon me. A. We met the Morgans; we got to talking for a little while and we put some money in the juke box and played it.

Q. Did you ever put any money in the juke box? A. I myself?

Q. Yes. A. I might have.

Q. Okay. Go ahead. A. Then they mentioned bowling for a beer, was a thing that we did quite often and Mike, and I agreed that we would take them on; see who would buy the beer.

Q. During the bowling game did you ever anticipate any problems would come as a result of the bowling game? A. Except that I was losing.

Q. Other than that. [p. 246] A. No.

Q. You stated that Mike Noe got into some type of argument with Agnes Morgan; is that correct? A. One

of them got into an argument. Both could have got in the argument with him, or he could have gotten into it with her. I don't know.

Q. I am sorry. What do you mean by both. Both could have? A. Yes.

Q. Who do you mean by both? A. It could have been Mike and Kyle and Agnes altogether in an argument. It could have been—I don't know how the argument started or who started it.

Q. You were talking to — A. Bob Ruff.

Q. — Bob Ruff at the time; right? A. Yes.

Q. They were talking in quite a loud voice; weren't they? A. Not particularly, no, not starting off. I wasn't paying any attention to them when Bob and I were talking.

Q. You mean this conversation with Mike and Agnes and possibly Kyle was not loud? A. Not loud enough to distract my attention until after I saw them all standing up when I turned around and saw Bob getting up, no, it wasn't particularly loud. [p. 247]

Q. Did you hear what they said? A. No.

Q. So, it is possible they could have had some conversation and some things could have been said that you never heard; is that correct? A. Yes.

Q. You stated that you stood up. Could you point on the diagram to the place where you stood up and tried to separate Bob, and I believe you said Kyle; is that correct, Bob and Kyle, you tried to separate? A. No, I didn't. I said—Do you want me to go past what has already happened?

The Court: I think before you start on that, we will recess for the noon recess now. I am sorry to interrupt your cross-examination.

Mr. Crawford: Thank you.

The Court: Ladies and gentlemen, we will now take our usual noon recess until 1:30 this afternoon.

While you are in recess, please remember what I told you yesterday about what you must do when you are absent from the jury box:

Don't talk about this case. Don't form or express an opinion on the case.

The clerk will recess the Court until 1:30 this afternoon. [p. 247-A]

THEREUPON, at 12:15 o'clock P.M., Tuesday, June 11, 1974, the hearing was recessed until 1:30 o'clock P.M. of the same day.

[p. 248]

Tuesday Afternoon Session,
June 11, 1974

CASEY STENGEL

having been previously duly sworn, resumed the stand and testified further as follows:

CROSS-EXAMINATION (Cont.)

By Mr. Crawford:

Q. Mr. Stengel, on March 1, 1971 did you appear facially any different than you do today? A. Yes.

Q. How were you different at that time? A. I had a beard.

Mr. Lewis: May we approach the bench?

The Court: Yes.

(Thereupon followed a discussion off the record.)

Q. (By Mr. Crawford) You stated you did look facially different at the time? A. Yes, sir.

Q. You say you had a beard on; is that correct? A. Yes, sir.

Q. Did you or Mr. Ruff or Mr. Noe have any knives or any weapons with you at any time during the evening of February 28, 1971 and March 1, 1971?

[p. 249]

Mr. Lewis: I have a further objection if the Court would care to hear it to that last question.

The Court: Read the question back to me.

(Question read back.)

The Court: Do you object to that question?

Mr. Lewis: Not as it relates to this witness; as to what he had. He may not know.

The Court: I will overrule your objection. This witness may state if he had any weapons on him or if he knew that the other two had weapons on them.

Q. (By Mr. Crawford) What's your answer to the question? A. I said no.

Q. Isn't your testimony here today that neither you nor Mr. Noe or Mr. Ruff ever struck Raymond Belcher?

The Court: Just a minute. I will sustain an objection to that.

Q. (By Mr. Crawford) Did you, Mr. Stengel, at any time during the evening of February 28 or early morning hours of March 1, 1971 ever strike Raymond L. Belcher? A. No.

Q. Did you observe Mr. Ruff at any time during that evening or the early morning hours of March 1, 1971 ever strike Raymond L. Belcher?

The Court: The question is did you see them? [p. 250] Did you observe them striking Belcher?

Q. (By Mr. Crawford) That you observed. A. No, I never observed him striking Belcher.

Q. Did you ever observe Michael Noe strike Raymond L. Belcher in the early morning hours of March 1, 1971? A. No.

Q. Do you recall the shoes that you were wearing that evening? A. Yes.

Q. Could you describe those? A. They were a light tan pair of boots, went up just over the ankle, about this high (indicating).

Q. I show you what's been marked as Joint Exhibit 58 and ask you if you can identify those? A. Yes, I can. Those are the boots I was wearing.

Q. Wearing when? A. March 28, March 1.

Q. February 28? A. Yes, February 28.

Q. And March 1, 1971? A. Yes.

Q. Did you observe the shoes that Mr. Ruff was wearing that evening? A. Yes, I did.

Q. What were they? [p. 251] A. Combat boots or army boots.

Q. They were — A. They wouldn't be known as combat boots but they are army fatigue boots.

Q. I show you what's been marked for purposes of identification as Joint Exhibit 57 and ask you if those are the boots, appear to be the boots that Mr. Ruff was wearing that night? A. Yes, they are the boots that Robert Ruff was wearing, that's correct.

Q. Do you know what Mr. Noe was wearing that evening? A. He was wearing a pair of stetsons.

Q. What is that? A. It is a home made boot.

Q. Let me show you what's been marked for purposes of identification as Joint Exhibit 56 and ask you if you can identify those? A. Yes, a pair of stetsons of Michael Noe.

Mr. Crawford: I have no further questions, Your Honor.

The Court: Do you have any questions on redirect examination, Mr. Lewis?

Mr. Lewis: If the Court please, may I approach the bench?

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Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

TESTIMONY OF DWIGHT JOSEPH

[p. 411]

Wednesday Afternoon Session,
June 12, 1974

DWIGHT JOSEPH

called by the plaintiff pursuant to Rule 43 (b), having been first duly sworn, testified as follows:

Cross-Examination

By Mr. Lewis:

Q. Will you state your name, please. A. Dwight W. Joseph.

Q. Where do you reside, Mr. Joseph? A. 5096 Sampson Court in Columbus, Ohio.

Q. What is your business or occupation now? A. Retired.

Q. Do you have any occupation at all? A. Not right now.

Q. Do you have any business at all? A. Not right now.

Q. Have you had since the retirement? A. Yes, sir. I had a business that recently went out of business.

[p. 412]

Q. When was that going out of business? A. It is not quite finalized; within the last three or four weeks.

Q. On February 28, 1971 and March 1, 1971, where did you reside? A. I think I was living in Grove City at the time.

Q. On those dates, February 28 and March 1, what was your occupation? A. I was Chief of Police of the City of Columbus.

Q. You had been chief of police how long? A. About a year until that time.

Q. Was your appointment about the time, same time Mr. Hughes was appointed safety director? A. I think Mr. Hughes was appointed safety director in January and I was appointed chief in March or early April.

Q. At that time how much experience; would you relate briefly what your police experience had been up to your appointment as chief? A. I entered the department as a patrolman in 1946, worked several assignments as a uniformed man. I was appointed to sergeant approximately seven years after that. I worked

in several different categories there, turnkey, street sergeant, uniform, and I was promoted to lieutenant approximately three years or four years after that, where I worked in the service subdivision and street lieutenant and head [p. 413] of the tactical squad.

I was promoted to captain where I worked most of the time as a uniformed patrol captain. I was promoted to a deputy chief where I worked in a service subdivision and then had the uniform subdivision.

From there I was promoted to chief of police.

Q. Would it be a fair statement to say that you had had a very broad police background when you were appointed chief? A. I think so, sir.

Q. How long did you hold the office of police chief before your retirement? A. Two years.

Q. What was the date of your retirement? A. It was in March of '72.

Q. Which was about a year after this incident? A. Just about a year, yes.

Q. At the time, February 28th and the early morning of March 1st, was there in effect some orders that certain people should be notified in the event of an unusual incident such as here involved? A. Yes, there was orders to call various people for various things.

Q. Did those orders include an order that you be called? A. In some instances.

Q. Did that order require that you be called in an [p. 414] incident like we have here, off duty policemen killing two? A. It would be a normal procedure for them to call me.

Q. What would the normal procedure be, sir, to call you at any time? A. Usually—this was usually the responsibility of the radio personnel to notify in various cases.

Q. Do you recall this incident erupted?—You have

been in the Courtroom—erupted about 2:00 o'clock or thereabouts on the early morning of March 1st? Do you remember where you were at that time? A. No, sir.

Q. Do you remember of getting a notification by radio? A. No, sir.

Q. When do you remember when you first were aware of this occurrence? A. Not when I was first aware of it unless it was when I came to work the next morning. I don't recall being notified, sir.

Q. Was this an unusual incident in the history of your tenure as a policeman, 24 years? A. Yes, sir, I would say it was somewhat unusual.

Q. Somewhat? A. Yes, sir.

Q. You don't know now why you didn't get immediate notification? [p. 415] A. No, sir, I don't. I suppose there may have been a possibility that they called me and let me know that it happened but I can't recall that.

Q. You have no recollection? A. No, sir.

Q. What is your first recollection about any knowledge of this incident, sir? A. I have very little recollection. I recall that when I came to work there was an investigation going on because of the altercation the night before.

Q. Do you recall who first made you aware of that? A. No, sir, but I would assume that it was because there was some papers on my desk indicating something had happened.

Q. Do you remember what you first did about it; who you last talked to? A. No, sir, I don't.

Q. You don't have any recollection of this unusual incident and what you first did? A. Now you asked two questions there, sir. Which one would you like me to answer?

Q. I will withdraw that. When does your recollection, what period of time do you have a recollection of what you did in connection with this occurrence? A. No, sir, I don't remember exactly what I did about this. [p. 416]

Q. I don't believe your answer was responsive. I think my question was — would you read it back, please.

(Question read back.)

A. I wouldn't know how to answer that, sir.

Q. (By Mr. Lewis) You recollect now that some time you started to do something about this; don't you, chief? A. Yes, sir, I am sure that there was — I was doing something about this but I would like to explain that there are several divisions within the department, one of them being the detectives subdivision and they would have been doing their work, and at that time we were having all types of high school uprisings and racial problems.

Q. I am sure you had —

The Court: Let him explain. Explain the breakdown of the department, Mr. Joseph.

A. Yes, sir. The department is divided into four subdivisions; service subdivision, investigative subdivision, the administrative subdivision, and the uniform subdivision. Each of these headed by a major.

The majors are or were all quite capable people and I did not involve myself personally in the operations of those departments.

Q. (By Mr. Lewis) Do you have any recollection of ever being at the scene of this incident? A. No, sir. [p. 417]

Q. Do you have any recollection of your talking personally to any of the other defendants about this

incident? A. Not to any degree, other than there was a meeting at one time at the community relations office at city hall regarding this particular thing.

Q. But I am talking about the time immediately after the incident. A. I am sure I talked to some of these people about it, yes.

Q. But you have no recollection of who they were? A. No, sir.

Q. Do you recollect the direct quotation reported in the story in the *Columbus Dispatch* on March third, two and a half days after this occurrence that you announced that, in substance, the investigation was over; the only thing that remained was to prosecute the man, Mr. Stengel, the man charged; do you remember such a statement? A. No, I don't remember such a statement. I would not doubt that there was such a statement but I don't remember it, sir.

Q. Would you doubt that you said such a statement? A. No, sir.

Q. You believe that you did say such a statement? A. That's possible.

Q. What reports flowed to you as chief in connection [p. 418] with this investigation; do you recollect that? A. No, I don't recollect exactly what reports came to me but I would assume that all of the statements or copies of statements, I know the report from the firearms board came to me. Most of the package would have came to me.

Q. Did you review it? A. Yes, I would say I reviewed it.

Q. Was that a careful review? A. It would not have been a great study of it. It would have been an examination of the materials, a scanning or something.

Q. Do you recall giving your deposition to me some

months back in which you referred to it as a cursory examination? A. Yees, sir.

Q. That was the way you described it at that time. A. Yes, sir.

Q. As chief of the Columbus Police Department at the time and following such an incident, do you feel that it justified something more than a cursory examination of the records and the reports? A. No, sir.

Q. At this time was there in effect a general order regarding the discharge of firearms? A. There was a general regarding firearms, yes, sir. [p. 4119]

Q. Did that general order cover discharge of firearms by policemen in all circumstances? A. Yees, sir.

Q. Whether they are in uniform or out of uniform? A. Yes, sir.

Q. At that time was there also in effect a general order or rule or regulation that at the time of any incident where force was used, that there should be a written report of use of force incidents? A. Yes, sir.

Q. Those were two separate requirements; were they not? A. What were two separate requirements, sir?

Q. It was to be a written report of the discharge of a firearm and a written report involving any use of force by the person involved; was there not? A. Well, there were letters required called use of force letters and these were so far as I am concerned the same as a use of firearm letter; it would have been the same thing. I don't see where we can separate them. They were more or less an explanation of the use of force or firearm.

Q. To your knowledge did Raymond Belcher ever write out in his own handwriting or dictate or sign

either one of this type of report? A. No, sir, he didn't make, so far as I know, he didn't make a use of force report on that. [p. 420]

Q. Was there ever any sworn testimony given any place by Raymond Belcher as far as the reports that he filled in in connection with this incident? A. Was there ever any sworn testimony?

Q. Was he ever put under oath as far as these reports were concerned? A. As far as the department was concerned, put him under oath?

Q. Yes. A. No, sir.

Q. Are you familiar or do you remember reading that item that is marked Exhibit 25 at any time previous to now? A. I remember reading all of the reports or going through all the reports. I suppose this one was among them, sir.

Q. Would you assure yourself by spending a minute, and did you read that particular report; either was that one that you gave the cursory reading to? A. Sir, it would be almost impossible for me to give you an honest answer of whether this report was the report I read at this time. This is quite awhile back. I want to answer you honestly.

I would say that in my opinion this is probably the one I read, yes, sir.

Q. Do you know of more than one report that was ever made of this incident as far as Belcher was concerned either by [p. 421] statement, writing, anything? A. No other than —

Q. By Belcher himself, I am asking, Raymond Belcher? A. No, I think he had to make an assault report when he was at the hospital, but other than that, I don't know of any.

Q. You think he signed an assault report? A. I

didn't say signed anything, sir. I said I think he made a report.

Q. But that's the only thing other than that that you see there? A. Yes, sir.

Q. Would you spend a minute or two and make a little more than a cursory examination of that. A. (Witness complies.)

Q. My question is this: That report purports to be a statement given by Raymond Belcher before the firearms review board. Would you look at that and determine who asked most of the questions or the vast majority of the questions in that report. A. The questions are by Captain or now Major Smith.

Q. He did the bulk of the questioning in that report. A. Yes, sir.

Q. Are there also a couple of questions by the other members of the board? A. I didn't notice any when I went through there. I will [p. 422] go through again.

There is one by Captain Taylor and when Captain Born was asked if he had any questions, he said no.

Wait a minute. Lieutenant Baker asked a couple questions here, and one by Sergeant Hopkins, I believe — two by Sergeant Hopkins.

Q. But, other than that, all the rest of the questions asked in that report were by then Captain Smith; is that correct? A. Yes, sir.

Q. Mr. Joseph, at that time was there in effect a general order about the use of firearms? A. Yes, Sir.

Q. I will hand you what's been marked for purposes of identification as Joint Exhibit 44 A and B and ask you which one of those reports — ask you what they are? A. Is this 44 A 1 or what? Is this 44 A 1 and B 1; sir?

Q. They appear to be A and B to me, 44 A. A. A and

B, all right, sir, I can see it now. 44 A is a General Order 71-14 C, date of issue was July 22, 1971, the effective date is July 22, 1971. It rescinds General Order 70-9D. It is regarding weapons regulations.

Q. 44 B is General Order 70-9 D, date of issue was July 30, 1970, effective date was July 30, 1970, and it rescinds [p. 423] General Order 70-1D. It is also weapons regulations.

Q. So, it is not true that 44 B would be the one that was in effect on March 1st? A. Yes, sir.

Q. I would like to have you examine 44 B that was in effect at that time. I believe it is on Page 4 and see whether you can verify that this language is in there:

"Procedure to be followed when firearm is discharged." Have you located that? A. Yes, sir.

Q. This following language, we have under heading one, "An officer shall be subject to discipline if the shooting of a firearm involves (a) a violation of law by him; (b) a violation of department regulations; (c) poor judgment involving wanton disregard of public safety."

Is that language in that? A. Yes, sir.

Q. Now, I would like to next direct your attention to sub section B. I have just read which says in effect that an officer be subject to discipline if there is a violation of departmental regulations in connection with the firearm discharge. A. Yes, sir.

Q. Is there something in that order about firearms that [p. 424] directs what types of a firearm? A. That may or may not be used?

Q. Yes. A. Yes, sir, "shall not exceed a .38 caliber, shall be inspected, registered and approved by the police range officer, .357 magnum is prohibited."

Then we have a regulation or regulations on the type of ammunition to be used and so forth.

Q. Is part of that regulation suggesting or requiring that the officer carry his official weapon off duty? A. Carry his official weapon?

Q. Yes. A. No, sir.

Q. Is there something in that regulation? A. It's got about the personal weapon off duty, if you want that read, sir.

Q. Yes. A. It says, "Members of the Division of Police desiring to carry a personal handgun, in addition to their issued revolver, shall request permission through the police range officer. The range officer, after the weapon has been inspected and registered, shall forward the request to the Chief of Police for approval.

Permission may be granted provided the following conditions are met: [p. 425]

(a) the weapon shall be inspected, registered and approved by the police range officer, and

(b) the weapon shall not exceed a .38 caliber and (1) the .357 Magnum is prohibited."

Q. Do you know if the weapon involved in this incident had complied with those regulations? A. I have no reason to disbelieve that they had, sir.

Q. You don't know whether that was checked? A. Not right now without going through some kind of records.

Q. As chief of police do you have some responsibility in connection with discipline? A. Yes, sir.

Q. Would you state what that responsibility was generally. A. It was an ultimate responsibility, of course, like many of the duties of the chief of police, they are subordinated, relegated to other officers down the line.

In other words, discipline should start with the immediate supervisor of any person and then he in

turn, if he feels that further discipline is necessary, handles it through a chain of command.

Q. Do you know if there was ever any disciplinary action of any kind taken involving this incident? A. Not that I know of. Whether a sergeant might say something to somebody about something, which is a form of [p. 426] discipline, that I wouldn't know about.

Q. What are the forms of discipline that could be administered? Would there be a written reprimand? A. It could be an oral reprimand; it could be a written reprimand; it could be such things as working their time off, their days off, written-verbal.

It goes on to where a person can either be suspended or fired.

Q. In your cursory review of this thing, you don't know whether any of those were done? A. I would say nothing like that happened through this thing.

Q. That's the best of your recollection? A. Yes, sir.

Q. Coming over to another part of your regulation. There is an order — Was there an order in effect at that time that officers who were off their regular tour of duty shall carry a weapon? A. Yes, sir.

Q. What was the purpose of that regulation, if you know? A. For a police officer to carry a weapon off duty?

Q. Yes. A. Because they are expected to take action in any type of police or criminal activity 24 hours a day, sir.

Q. Go ahead. [p. 427] A. They would be subject to discipline if they didn't take action.

Q. So, if an officer carrying a gun as required did use that gun, he would be operating under the authority of those regulations? A. Yes, sir.

Q. Did you feel that that was what Raymond

Belcher did in this situation? A. Do I think — what was that?

Q. Did Raymond Belcher act under the authority of those regulations in the incident that's here involved? A. Yes, sir.

Q. As chief do you approve compensation claims that might be filed in connection with some activity? A. Ultimately.

The Court: Activity of what? You haven't completed your question, I don't believe.

The question is: As chief of police do you approve claims for compensation? —

Mr. Lewis. He started to answer before I did get to that point.

The Court: For injuries suffered by members of the police department in the course of their official duties?

Mr. Lewis: That was what I was going to say but he started to answer. [p. 428]

Could you answer the question that the Judge stated?

A. Yes, so far as approving the claim; that would be up to someone higher than me as far as approving a claim. I would forward for approval with any recommendation for approval those papers. My signature would be there for that.

Q. (By Mr. Lewis) Do you have any recollection if there was an approval for the claim for compensation by Officer Belcher out of this incident? A. I think there was. I can't recall signing it, but I think there was.

Q. Do you have any recollection of what that claim amounted to? A. No, sir.

Q. The amount of days off or anything of this kind. A. No. sir.

Q. Do you have any recollection of the extent of

any injuries mentioned in that claim? A. Mentioned in the claim?

Q. Yes, sir. A. No, sir.

Q. I hand you what's been marked for purposes of identification as Joint Exhibit 24 A, running through 24 J, and ask you to examine that and then give particular attention to the last page on that which was 24 J; see if you can state that that is. [p. 429] A. (The witness complies.)

Q. Coming back to Page J of that exhibit, will you read the statement that is written in there over the signature that appears to be Raymond Belcher's. A. It is number 3 there: "Describe in detail how accident occurred, giving exact location and any tools, machinery or outside influences involved and the part of body affected."

It is filled in then in handprinting R. Belcher was in Jimmie's Bar, 2338 Summit Street, when three male whites attacked him and were beating, causing abrasions and contusions on the chest, face and neck."

Signed, Raymond L. Belcher.

Q. At the bottom of that is there something signed by some other police officer regarding that claim? A. Sergeant A. J. Malloy. That's the signature of the supervisor and right under that is my signature as the division or department head.

Q. That would therefore seem to indicate that you had signed the approval of that as stated above? A. Yes, sir.

Q. Do you know when you signed that? A. No, sir. It has a date on it, March 2, 1971. I suppose that's the time I signed it. I don't know.

Q. I hand you what's been marked for purposes of identifi- [p. 430] cation as Joint Exhibit 42 and ask

you to look at that and see what that is? A. Do you want me to read this?

Q. No. Just state what it is, if you know. A. It is a form apparently from the chief city physician or personnel office of the police department, and it is a notification that Raymond Belcher, marked off on 3-1-71 due to a — well, it says reoccurrence of or result of an injury on duty, which is underscored.

Received on 3-1-71, 2:15 A.M.

The reason for markoff; abrasions, contusions about the head, neck, face, body; attacked by three male subjects written in.

It says that injury on duty — deduct from injury leave. There is some handwriting on it. It says, "Although this officer was 'off duty,' he was in line of duty under circumstances relating to police duties," and the initials under that J.P., and I would imagine that is John Pernard with the Industrial Commission.

Mr. Hughes: Your Honor, I would object to this line of questioning at this time. I don't think it has any relevance to the case. We are happy to stipulate the authenticity of any of these documents that we have been talking about for the last half hour or however long it has been.

The Court: I will overrule your objection at this [p. 431] time.

Q. (By Mr. Lewis) Are you familiar enough with industrial claims to know or to be aware that if an injury involves the necessity of treatment by a private physician, that that private physician submits his bill directly to the Industrial Commission and recites what treatment he gave? A. I don't know what their procedures are.

The Court: Come up.

(Thereupon followed a discussion off the record.)

Q. (By Mr. Lewis) Would you examine the rest of that file and see if there is some further claim set out at some later date in connection with this incident? A. I think I saw something like that in here. I am not sure. There is a sick or injured certificate of disability dated 3-22-72.

Q. Is there further — Go ahead. A. It's the police form that's made out when someone marks off duty either injured or sick, and this one indicates that Raymond Belcher marked off March 22, 1972 at 9:30 PM because of an old back injury incurred 3-1-71.

Q. Was there anything in that first statement back in J signed on the day that related to a back injury, at the top of J if you please. A. The top of J? I was reading down here; there is extent of injuries down here. [p. 432]

Q. I asked you to read Belcher's statement again over his signature. A. (Witness complies.) No, it just said beating causing abrasions and contusions on the chest, face and neck.

Q. That's all on that point.

Do you remember when this suit was filed? A. What suit?

Q. The suit that's now before the Court? A. Oh, no. I don't know when it was filed; no.

Q. When did you resign as chief; do you remember that date? A. I didn't resign. I retired when my time was in in March.

Q. Of what year? A. '72.

Q. This suit was filed just shortly or before you retired; is that correct? A. I don't know, sir. I have been sued for several million dollars from different organizations during the time I was chief of police and I don't recall which suit came first.

Q. No connection? A. No, sir.

Mr. Lewis: Could I confer? [p. 433]

The Court: Yes.

(Thereupon followed a discussion at Plaintiffs counsel table.)

Q. (By Mr. Lewis) Mr. Joseph, you have been in the courtroom — this is the third day of this case — and you have heard a good bit of detail about moving gun casings. You have heard some details about a witness leaving the scene when other witnesses were there and some other items.

Do you recall any sanctions of any nature that you directed in connection with this incident? A. No., sir.

Q. Do you recall any sanctions or official criticisms of anybody else in connection with this incident, in connection with this incident given to Ray Belcher by anybody else? A. No, sir.

Q. Did you confer with the safety director about this incident, Mr. Hughes? A. When?

Q. At any time. A. I am sure that Mr. Hughes and I talked about it.

Q. Frequently? A. I don't know whether you would say frequently. I am sure we discussed the case. As you said, it was an unusual one, and I am sure we discussed it.

Q. I hand you what's been marked for purposes of [p. 434] identification as Joint Exhibit 74 and ask you to state what that is, sir?

Mr. Hughes: Your Honor, may we approach the bench on this exhibit?

The Court: Yes.

(Thereupon followed a discussion off the record.)

Q. (By Mr. Lewis) On March 3rd when you say you may have made the statement directed to the reporters that the matter was all closed except prosecuting

Stengel, was there still something going on within the department by way of this checking this incident? A. I am sure there was probably still investigations going on, yes, sir.

Q. Did you at any time ever become aware of what the relationship between Belcher and Bonnie Lohmann was? A. No, sir.

Q. Did you ever become aware of any questions that were subsequently raised about the validity of the testimony of some of the witnesses? A. Questions about the validity?

Q. Validity of the testimony of some of the witnesses that had been interrogated previously? A. I really don't know of anything.

Mr. Lewis: Could I?

(Discussion at plaintiffs counsel table.) [p. 435]

Mr. Lewis: The plaintiff has concluded the examination of this witness.

The Court: Mr. Hughes.

Mr. Hughes: Thank you, Your Honor.

Cross-Examination

By Mr. Hughes:

Q. Chief Joseph, during the time you were chief of police of the City of Columbus, were you the highest ranking sworn police officer of the City of Columbus? A. Yes, sir.

Q. In that capacity was it your responsibility and duty to file criminal charges against a police officer if he violated the law? A. Ultimately, yes, sir.

Q. You did not file charges in this case? A. No, sir.

Q. Why didn't you? A. Because the officer didn't violate the law.

Q. In other words, you came to the opinion there was no violation of law? A. Yes, sir.

Q. Under the charter of the City of Columbus, whose duty was it to file charges against an officer if he was engaged in such serious conduct as to warrant extreme discipline or [p. 436] firing? A. Chief of Police.

Q. What would happen to those charges once they were filed? A. They would be heard before the Director of Public Safety.

Q. What would the option of the safety director at that time be? A. He could initiate punishment or discipline up to and including firing.

Q. Did you file such charges against Officer Belcher? A. No, sir.

Q. Why not? A. Because there was no reason to file charges against Officer Belcher.

Q. Chief, is there a difference between an officer engaging in improper, illegal conduct that would be either a violation of law or regulations as distinguished from violation of some established police practice? A. Yes, there would be quite a bit of difference.

Q. Picking up two shell casings from the ground; would that constitute a violation of law or regulation? A. No, sir, not necesarily.

Q. It would violate a good police practice? A. If in the case of a place where people are milling [p. 437] around and kicking stuff around, it may be to preserve it, keep it from being stepped on or something like that.

Q. Let's assume for a moment the allegations that seem to be being made by counsel for the plaintiff; that it was improper and malicious of some type for Officer Belcher to have picked up these two casings.

Would that be of such a serious nature, assuming the argument that they are making — and I think you understand it — that you would have filed charges against Officer Belcher? A. No. sir, not under those conditions. Had he put them in his pocket and carried them away or tried to conceal them, it may have been different. He turned these over to the first detective that came in.

Q. In order to file charges against an officer and have a hearing before the safety director, did the officer have to either violate rules and regulations or law ? A. Yes, sir, one or both.

Q. Would the picking up of the cartridges and turning them over to a detective constitute a violation of law or a violation of regulation? A. Neither.

Q. Counsel has asked of you to examine two particular general orders of the police department. Do you know who the author of those two were? A. The one, the original was I think authored by the [p. 438] director of public safety, and I believe that was Frederick Simon. I didn't read the signature on that. I just know there was a D on the end which indicates director.

The latest one was a C which indicated it was authored by myself.

Q. So, you were the author of the one that was in effect at the time that Officer Belcher was involved in this shooting? A. No, sir. I think that one that I authored was later. There is very little difference in them.

Q. As I understand the regulation, it required that the officer submit a written report when there was either use of force or use of weapon? A. Yes, sir.

Q. Do you consider as the author of one of those reports, the written stenographic report of the inter-

rogation of the officer by Major Smith to constitute such a written report? A. Yes, sir.

Q. After a stenographic report has been given, would there be any reason for him to go back and do a long handwritten report? A. No, sir, that would be superfluous.

Q. Chief, in the tenure that you had as chief of police of the Columbus Police Department, did you have occasion to discipline officers? A. Yes, sir. [p. 439]

Q. Did you have occasion to ask for officers resignations? A. Yes, sir.

Q. Did you have occasion to file charges against officers and have hearings before myself? A. Yes, sir.

Q. As a result of some of those hearings before myself, were officers fired? A. Yes, sir.

Q. I think that part of the allegation of the plaintiffs' case is that as soon as there was an incident involving an officer, some magic mechanism goes into effect.

(Mr. Lewis rising from chair at counsel table.)

The Court: Just a minute. I am going to strike that question insofar as you have gone with it and instruct the jury to disregard what counsel has said.

I won't let you ask the question in another form either, Mr. Hughes. That's one of the big issues in this case.

Q. (By Mr. Hughes) Approximately how many officers during the two years that you were chief of police were actually removed from the force either cause of discipline, initiated by yourself or where you requested resignations in lieu of such discipline?

Mr. Lewis: Object. [p. 440]

The Court: Overruled. A. I don't know the exact number, sir. I do know there was three or four.

Q. (By Mr. Hughes) During this period of time?

The Court: The period of time that Mr. Joseph was Chief of Police?

Q. (By Mr. Hughes) I am sorry, Your Honor. During the period of time that we have in question, the incident early March, late February of 1971.

Could you outline some of the problems that you as chief of police had that were occupying your attention.

Mr. Lewis: Object.

The Court: Sustained.

Q. (By Mr. Hughes) What was the size of the Columbus Police Department in approximately this period of time, March 1, 1971? A. I think we had about 1300 employees. I am not sure.

Q. All of whom you were responsible for ultimately? A. Yes, sir.

Q. As chief of police do you get involved in or did you get involved at this period of time about the incident with much paper work? A. Yes, sir.

Q. As a part of that paper work I think you testified that you gave a cursory reading of the file that was [p. 441] presented to you; is that correct? A. Yes, sir.

Q. Based upon that were you able to form an opinion as to the propriety of the actions of the firearms review board? A. Yes, sir.

Q. What was that opinion? A. That I would accept their opinion that it was a complete and thorough report.

Q. What did you do with the report that came to you from the firearms review board? A. I would have — and I don't know how I did this at the time — I would have approved or marked it recommend, approval for your approval and sent it on to you.

Q. Who were the members of the firearms review

board? A. At that time — Well, for this particular case — was Smith, Taylor and Borne, captains.

Q. Approximately how many captains were there on the police department? A. We had about 12 or 14 at the time. I am not sure.

Q. Is the rank of captain of police a rather high rank? A. Yes, sir.

Q. Most of us think in terms of military rank in comparison to the Army, Navy, etc. In terms of responsibilities of a police department, could you contrast having been in the Army, the degree of responsibility of a police captain [p. 442] versus a captain in the Army? A. I would say that the captain in the police department should rate like a major or in that area of the Army or military.

Q. In other words, it is a very responsible position? A. Yes, sir.

Q. Had you had an opportunity during your career to observe the work of the three captains that sat on this board? A. Yes, sir.

Q. Would you have an opinion as to their competence, intelligence, industry and honesty? A. Yes, sir, I sure do.

Q. Based upon these opinions, and your observations of these officers, did you have an opinion as to the competence of the board itself. A. I had an opinion and a good opinion of the competence of the board. They are all three very well informed, competent officers.

Q. In taking into consideration the Belcher case and the file that came to you, did you to any extent rely upon the fact that they had recommended that the firing was justified in your coming to a similar conclusion? A. Yes, sir.

Q. Did you make an independent investigation apart from either the firearm board or the homocide division? [p. 443] A. The only investigation, type of investigation that may have been carried on any further was that of the internal affairs; might have made a followup, just a summary followup.

Q. Was the investigation of the internal affairs bureau, did it substantiate or contradict the findings of the firearms review board? A. Backed it up.

Mr. Lewis: I object.

The Court: You object to the last question?

Mr. Lewis: Yes.

The Court: Overruled.

Q. (By Mr. Hughes) Is it the function of the chief of police to conduct personal investigations? A. No, sir.

Q. If the chief of police, yourself, at this particular time wanted additional information or additional investigation, how would he undertake that? A. It would be according to the situation, but probably the quickest form would be to go through the internal affairs organization or bureau.

Q. You would not expect the chief of police to go out and interview witnesses? A. No, sir.

Q. Chief, in your experience as a police officer, Columbus police officer, would it have been considered routine or [p. 444] proper for the detectives on the scene to have taken blood or urine samples from mere witnesses who were not suspects? A. No, sir, they wouldn't have been allowed to take samples from them.

Q. Probably would have been illegal? A. Yes, sir.

Q. Would it be normal for the detectives on the scene to have taken photographs of the witnesses at the scene? A. No, that wouldn't have been normal.

Q. Would it have been normal for the detectives on the scene to take written or stenographic statements from the witnesses on the scene rather than at police headquarters? A. No, sir, it wouldn't have been normal.

Q. Do you see anything improper about the fact that Detectives Young and Hardin did not take stenographic or written statements from the witnesses, did not take samples and did not take photographs of those witnesses at the scene? A. There is nothing improper about it. I see it all as proper procedure.

Q. Chief Joseph, as I understand your testimony, you have no independent recollection of discussing this case with any of the defendants at or about the time of the incident; is that correct? A. No, nothing special.

Q. Your testimony is that you probably talked to several [p. 445] of us but you have no independent recollection? A. That's right.

Q. Chief, to use the term that Mr. Taylor used, do you know what is meant by command influence? A. Yes, sir.

Q. Would you as briefly as you can describe for the jury what is meant by command influence? A. I would say that it would be influence by the mere fact that someone is your superior officer.

Q. Did you exercise any command influence over anybody to do anything other than carry on a normal routine and honest investigation? A. No, sir, I didn't.

Q. Are you aware of any command influence being exercised by any of your subordinates? A. No, sir.

Q. Are you aware of the safety director exercising any command influence? A. No, sir.

Q. Did you in any way, by direction or indirection, indicate to anyone in the police department at any

time what the result or what result you desired to come out of this particular investigation? A. No, I did not.

Mr. Hughes: No further questions, Your Honor.

[p. 446]

The Court: Mr. Lewis.

Mr. Lewis: Just a couple.

RECROSS-EXAMINATION

By Mr. Lewis:

Q. I believe you did admit to Mr. Hughes' first or second question that it was your responsibility, and yours alone, to make a determination of whether or not the officer committed a crime; did I understand that correctly? A. Whether he had committed a crime?

Q. Yes; as distinguished from one of the lesser — A. I think the question was different; whether to distinguish a crime. I think anyone could distinguish a crime.

Q. Then maybe I didn't understand Mr. Hughes' question, but I thought it was that there was a duty on you to take some action if you felt that an officer had committed a crime. A. That I will agree with.

Q. That was one responsibility that was on your shoulders? A. That I will agree with.

Q. Well, that would be a much heavier responsibility than getting down to the details of what an officer might then be in violation of regulations; would it not? A. I didn't understand that. I don't know. It is according to what kind of crime is committed.

Q. In this incident there were two deaths under the cir- [p. 447] cumstances of an off duty, out of uniform at least policeman killing two individuals and one seri-

ously permanently injured. Do you think that justified more than a cursory examination of your responsibilities in determining whether crime had been committed? A. A cursory examination? I don't understand that statement, sir.

Q. Cursory, Mr. Joseph, is the phrase that you have used several times here. It is a phrase that you used on your deposition to indicate that you hadn't spent much time with the reports that came up to you through channels; wasn't it? A. No, sir. I don't think it indicated that. I think I indicated to you that I scanned or gave cursory examination to some of the statements and so forth. This did not say that I gave cursory examination to anything nor did it say that I spent very little time on the thing.

Q. Didn't you indicate that you basically relied on these captains that made up the firearms review board? A. I not only relied on the captains that made up the firearms review board; I relied on the detectives in the homocide squad who are highly competent people, well trained and the officers on up from there. I had to rely on those people, sir.

Q. The firearms review board had no authority whatever to arrive at a determination that controlled your responsi- [p. 448] bility about determining whether a crime had been committed by an officer; did it? A. No, that wouldn't have anything to do with whether —

Q. You couldn't delegate that responsibility to them and you did not? A. That's right.

Mr. Lewis: Thank you.

Mr. Hughes: Nothing further, Your Honor.

The Court: You may leave the witness stand, Mr. Joseph.

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Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

TESTIMONY OF JAMES J. HUGHES, JR.

[p. 453]

JAMES J. HUGHES, JR.

called by the plaintiffs under the provisions of Rule 43 (b), having been first duty sworn, testified as follows:

CROSS-EXAMINATION

By Mr. Lewis:

Q. State your name, please. A. James Joseph Hughes, Jr.

Q. What is your present occupation? A. I am an attorney.

Q. Do you have a particular position? A. I am the elected City Attorney of the City of Columbus, Ohio.

Q. Where do you reside, Mr. Hughes? A. 2500 Arrowwood Court, Columbus.

Q. Where is that located? A. It is located in the northeast section of the city known as Forest Park East.

[p. 454]

Q. On February 28 and March 1, 1971, what was your position? A. I was Director, Department of Public Safety, City of Columbus.

Q. As such director, did you have supervisory au-

thority over the police department, City of Columbus? A. I did.

Q. Where did you live at that time, sir? A. 987 Grandview Avenue in the City of Grandview Heights.

Q. Do you know, are you able to give an approximation of how far your home at that time was from the scene of this incident on Summit Street. A. I would estimate two miles, sir.

Q. You have heard testimony about requirements of notification of certain police officials and supervisory officials if an unusual incident occurs. Were you included on the list of people that would get notice? A. I was.

Q. Do you recollect—Withdraw that.

On March 1, 1971 what was your age? A. My age.

Q. How old were you at the time? A. Thirty-three.

Q. How long had you been safety director for the City of Columbus. [p. 455] A. Since January 1, 1970, so it would be 18 months or so.

Q. January 1, 1970 to March 1, 1971 would be 14 months; wouldn't it? A. Yes, sir.

Q. When did you as safety director first get any notice of the incident that is the subject of this? A. Very shortly after the incident.

Q. By that you mean minutes. A. Yes, sir.

Q. How was that communicated to you? A. By police telephone.

Q. At that time would the regulations require that Chief Joseph receive a notice of this type of incident if he could be found. A. Policy would have been that the chief would have been notified also.

Q. Where were you when you received the notification? A. In bed.

Q. What did you first do after you received this notification? A. On my way into work the following

morning I stopped by the scene which was located a slight deviation from my normal way of getting to work.

Q. Do you recall when we took your deposition just a few weeks ago and is that what you said at that time, or did you [p. 456] not recollect? A. I think at that time I indicated to you I didn't recall whether I went to the scene that night or the next morning. Since that time I have reviewed various documents, talked with various people, and I know that I did not go that night; that I went the next morning on my way in to work.

Q. At the time of that deposition I believe you indicated you had something to do with the early notification of this incident to the coroner. A. No, sir, I did not. I said I had conversations with the coroner before I wrote a final report on this case.

Q. Didn't you say that, just a few weeks ago, that you talked to the coroner early that morning to notify him of the incident by phone? A. No, sir, I don't notify the coroner of an incident. I talked with the coroner that morning about the incident. I did not notify the coroner of the incident.

Q. Who, if anybody, did notify the coroner earlier; do you know? A. No, sir, I don't know who notified the coroner. I know the coroner is notified any time that there is an unusual death.

Q. Is that notice to be immediate. A. I don't know, Mr. Lewis.

[p. 457]

Q. I hand you what's been marked as Joint Exhibit 49. Would you examine that and state what that is. A. The document states that it is a copy of the coroner's report finding of fact and verdict pursuant to Revised Code Sections, etc.

Q. Was that document produced from the police files

in this case in connection with this case? A. Mr. Lewis, I don't know where you got this document.

Q. Mr. Hughes, that's listed as a joint exhibit and you're counsel in this case. How long —

Mr. Crawford: Your Honor, at this point if this line of questioning is going in with regard to him being counsel, I didn't think that was the purpose of his testimony.

The Court: Of course it isn't the purpose of his testimony. I think that you, Mr. Lewis, ought to talk to Mr. Crawford about where this came from and what it is a part of. I think what you are asking is, what you seek to ascertain is whether or not the document that Mr. Hughes is holding in his hand was a part of the whole official investigation of this incident. Is it not?

Mr. Lewis: Yes, and as I understood we had agreed by these joint exhibits that they were authentic and so forth.

The Court: There is not any dispute about the [p. 458] authenticity of this. I think you can easily agree where it came from.

Does that document, Mr. Hughes, form a part of the whole official file on this incident? A. Your Honor, to the best of my knowledge a copy of the coroner's report at some time should have been put into the file. I have no personal knowledge that it ever was.

The Court: Mr. Lewis, if you and defendants' counsel are agreed as to the authenticity of this document, what difference does it make right now how that got into your hand?

Mr. Lewis: None.

The Court: Why don't you withdraw your question then?

Mr. Lewis: That's right.

Q. (By Mr. Lewis) I hand you what's been marked as Joint Exhibit 48. Does that appear to be a copy of the coroner's findings relative to Michael Noe? A. Yes.

Q. At the end of each of those reports, does there appear a signature? A. There appears to be a facsimile stamped signature.

Q. Does there appear a date beside that facsimile stamped signature? A. First day of March 1971.

[p. 459]

Q. That was the date of the incident here? A. Affirmative.

Q. To the best of your recollection when did you first contact or communicate with the coroner? A. To the best of my recollection I had a discussion with the coroner on March 1, 1971. I do not remember whether I called him or he called me. It was a telephone conversation.

Q. Do you remember the nature, anything of the nature of that discussion? A. Yes, sir. If I recollect or remember correctly, we had a general discussion as to the findings in terms of where the bullets went, the path of the bullet, the cause of death and a discussion as to the coronor's opinion as to whether he was ultimately going to rule the activities of Officer Belcher to be justifiable or non justifiable.

At that time the coroner indicated to me that based upon what he knew, he was going to rule that the shootings were justified.

Q. That was the very day of the incident? A. Yes, sir, it was. I believe that I had subsequent phone conversations with the coroner concerning this matter at subsequent dates. I do not know what dates. I do not know the substance of them, but I know that he did not change his opinion and that he did so rule.

Q. Did he, to your knowledge, make any independent [p. 460] investigation of this situation separate from the Columbus Police Department? A. I am not in a position to testify whether he did or did not do so.

Q. Well, he would not have had time to make a very complete investigation in less than 24 hours; would he?

Mr. Crawford: Your Honor, I will object to that question.

Mr. Lewis: I will withdraw it.

The Court: You withdraw the question?

Mr. Lewis: Yes, I am sorry. It was argumentative.

Q. (By Mr. Lewis) Do you remember who accompanied you to the scene? A. No, sir, I do not. I am not even sure whether anybody did accompany me to the scene.

The Court: Are you referring to, Mr. Hughes' going by Jimmie's Cafe on his way to work on the morning of March 1, 1971?

Mr. Lewis: Yes.

Q. (By Mr. Lewis) After you were wakened by this incident at your home, did you have further communications of any kind with any members of the police department before your stopping at Jimmie's Cafe on your way to work in the morning? A. I do not know who the officer was that called me, but [p. 461] my recollection was that it was a supervisor, not a patrolman. My recollection was that at that time, since it was in a bar, I told him that an alcohol test should be made of the officer. I have a recollection of that conversation. I do not have a recollection of who I told that to. I do not have a recollection of having any other telephone conversations that morning.

I do not have a recollection of having any more conversations until I went to Jimmie's Cafe.

Q. Did you meet someone at Jimmie's Cafe that morning? A. At the time I went to Jimmie's Cafe, I am relatively certain that I met Detective Sergeant Pleasant Hopkins and that he was there at that time doing some sort of a followup investigation, and to the best of my recollection—and I am not positive it was Detective Sergeant Hopkins—that basically gave me a rundown of what had happened that night.

Q. Could you fix a time, a reasonable approximation of what time of the morning you met him there? A. No, sir, I can't. Being a Monday morning, I don't know whether I went in early to work or late to work. It was my way into work.

If it was standard procedure, being somewhat lazy, it would have been probably 9:00 o'clock or a little bit after. I may have gone in early because of the incident, but honestly anywhere between 7:00 and 10:00.

[p. 462]

Q. How long did you discuss the matter at Jimmie's cafe with Sergeant Hopkins? A. For a minimal period of time. I did walk through the bar to get an idea of what the bar looked like so that when I did read or see it at later times, I would have an understanding of the physical location and what it consisted of.

Q. By minimal time, what do you mean? Could you be a little more — A. I would guess the conversation, based upon my present recollection, would have been one or two minutes; a minute conversation.

Q. You had no prearrangement to meet Sergeant Hopkins there? A. No. sir, I did not.

Q. He just happened to be there? A. It is my understanding that he was there on a followup investigation. I did not know that he or any officer would be there.

Q. Did he remain at the scene after you left that scene? A. I can't say. I think I simply interrupted what

he was doing, and I think he went on about his business.

Q. You think he stayed there for further business, whatever it was? A. Based upon my recollection, I don't know. [p. 463] Based upon knowing what I know as having prepared this case, I know that he was there for a longer period of time.

Q. Based on what you know having prepared the case, he had been there for a substantial longer period of time? A. It is my understanding he conducted a thorough investigation of the scene looking for the possible fourth bullet, and that it took him quite a period of time.

Q. That investigation you have just been talking about, do you know if that was conducted after the affidavit that's heretofore been referred to that Sergeant Hopkins filed in the early morning, charging Casey Stengel with the crime of assault with intent to kill? A. I don't know, but as I would reconstruct it, knowing that the arrest took place on the U-10-100 at 10:30, it would be my best estimate that that meeting and conversation took place prior to the filing of the affdavit.

Q. I believe Officer Young testified that it was at 10:00 o'clock that the U-10-100 arrest papers were filed; is that right? A. If I may have the exhibit, I will read from it.

Q. I will hand you this joint exhibit and ask you to read the time listed as the arrest time on that. A. The arrest date is 3-1-71. The arrest time it has 10 and it could be 10:00 o'clock. It has a line drawn through it and slate time says 10:30.

[p. 464]

Q. If Sergeant Hopkins had testified on deposition earlier in this case that he filed the arrest affidavit before he went back to the scene to check these bullets, you wouldn't be in a position to dispute that?

Mr. McGrath: Your Honor, I am going to object.

Mr. Crawford: Object, Your Honor.

The Court: Just one. I will take objections only from Mr. Crawford.

Mr. Crawford: I understand that, Your Honor. The objection to this is he is referring to this testimony in a deposition of a witness who as yet has not testified in this case. I think it is improper to refer to what testimony might be of this witness.

The Court: Sustained.

Q. (By Mr. Lewis) Do you remember what you did after this two minutes that you were stopped at the scene; what you did next on that morning? A. No, sir, I don't, but I assume that I normally would have gone to my office.

Q. Do you remember your next activity in connection with this incident? A. According to a referral to my calendar of events, I went to a cabinet meeting.

Q. Do you know what time that was scheduled? A. The cabinet meeting was scheduled at 9:30. Whether I [p. 465] got there on time for it or not, I don't know.

Q. Do you remember what you did next in relation to this incident; what participation you may have had? A. Actually, Mr. Lewis, I do not remember independently any other activities that I took in regard to this incident at any particular time.

I know that I had various conversations with the chief of police concerning it. I know that I reviewed the various summaries that were sent to me; the various files that were sent to me, and the various statements that were sent to me.

Q. I believe you indicated you knew you talked to the coroner on that morning; is that correct? A. Yes, sir, I think I have already testified to that.

Q. But you don't remember the time of day or how many calls? A. No sir, I don't, or who initiated them.

Q. Did you at any time discuss this during that day with the firearms review board; do you remember? A. I do not remember. I know that I read their initial report on that date.

Q. What's the next incidence of participation in this incident that you do remember in succeeding days? A. The next incident that I remember in this particular case was when the chief told me that he was transferring Officer Belcher from being on—walking the beat in the [p. 466] north end to a position of relative safety in the burglary squad rather than leaving him on the street.

Q. Can you place that in point of days? A. I believe that was either that day or the next day, but I can't tell you for sure.

Q. So, Officer Belcher was on duty the next day but in another section; is that correct? A. It is my recollection that he was marked off sick; however it is my recollection further that the intention was that when he did return to work, that he would be put in a different capacity; that he would be removed from the street, which is rather exposed and dangerous under the circumstances with the resulting publicity, and would be brought into the burglary unit that investigated from police headquarters where he would not be in uniform.

Q. Do you know who made that recommendation? A. No, sir, I don't. I know that the chief did it and he just was advising me of the fact that he did it which was his prerogative and right.

Q. What is the next specific incident or specific thing that you remember about this, incident? A. The next thing that I would remember is receiving the complete recommendation from the firearms board concurred in by the chief to me indicating that it was the opinion of the firearms board and the chief that the discharge of the weapon [p. 467] by Officer Belcher under the circumstances was justified and proper.

Q. Do you know when you received that? A. No, sir, but it was a matter of a few days after the incident.

Q. What is the next thing that you remember? A. The next thing that I have an independent recollection of was on the 15th when Mrs. Ruff and Mrs. Juanita—and it's not Ruff but it's close to it.

Q. Roth? A. —asked for an interview with me and it was granted. They came in to see me that day.

Q. Do you know if anybody—how that interview had been arranged, who through? A. Having checked by calendar again, it would appear that it was arranged by my secretary because the appointment is written in in her handwriting as being March 15, 4:45, Juanita Roth, if that's what her name is, and her telephone number and a little notation that they wanted ten minutes of my time.

Q. Was there any advice to you of the nature of that request for time? A. Not to the best of my recollection. It would simply be that they wanted ten minutes of my time, and the appointment was set for 4:45 in the afternoon. [p. 468]

Q. Prior to that appointment, did you make inquiry as to what they wanted to see you about? A. I may have or I may not have. I don't know. Generally my calendar is kept by my secretary and she decides that in many instances.

Q. You have heard Mrs. Ruff, the mother of Robert Ruff and the grandmother of Casey Stangel, testify briefly in this case. Do you recognize that lady as being one of the two? A. No, sir, I am sorry, I don't recognize her as being one of the two, but I have no reason to doubt that she was one of the two.

I know there was an older lady and a lady in chronological date from her somewhat younger. I don't remember whether they were mother and daughter or what. They did come into my office and we did discuss this case.

Q. When they came in, did you have the file of this case on your desk or before you? A. Yes, sir, I did.

Q. Some place along the line you had found out what this ten-minute time request was then, I take it? A. I don't know. The file had been on my desk, I am sure, since the incident because it was pending business and the file by that time had grown to about an inch in thickness.

Whether I know or not what they were to see me about, I don't know, but I certainly would not doubt that I did. [p. 469]

Q. In the regular course of business, the investigation file at that stage was on your desk? A. My file. I receive carbon copies of everything that was done.

Q. You received copies of exhibits and things like that? A. Copies of reports, copies of statements, copies of progress reports, copies of some of the incident reports.

Q. What about exhibits? A. No, sir, I didn't have the boots or the gun or the bullets or anything like that.

Q. What about pictures. A. I had some pictures.

Q. Did you know the time they arrived what they came there to talk to you about? A. I can't testify to

that fact one way or another. It would be probable that I did.

Q. You heard Mrs. Ruff estimate the time of that interview as 20 to 25 minutes. Would you have any disagreement with that? A. No, sir, it was a lengthy interview.

Q. Twenty to 25 minutes you felt was pretty lengthy regarding this situation? A. No, sir, I can't characterize 20 to 25 minutes as lengthy. I will not disagree with the time she indicated. My recollection only is that it was a lengthy interview. [p. 470]

Q. Do you recollect the inquiry of these ladies that an investigation of these shooting deaths be made by you? A. As I remember the interview, it started off very calm, peaceful and quiet.

Basically they wanted—

I remember this as a very unfortunate incident. It is one of the three times that I did lose my temper when I was safety director.

The matter started off in a very calm, peaceful manner. As the lady indicated, a younger woman did most of the questioning.

Basically she asked me to go over the facts and what I knew about the case. I can remember basically discussing it with her, discussing the activities that went on.

We discussed the case, the merits of the case in the course of the investigation for a period of time. At a certain point in the conversation it became more than hostile. At a certain point the young lady, not the elderly lady that testified, but the younger of the two women, who I think was probably senior to myself, indicated to me that she intended to have Officer Belcher, other officers of the Columbus Police

Department, including Lieutenant Belcher, indicted and she made other threats.

At that time I became angry and agitated. Then she testified I believe that I took a picture, and there was [p. 471] a picture in the file of Officer Belcher, showing his condition, showed it to them and told them that as far as I was concerned, that the interview was terminated and the case was closed.

I indicated to them that I did not believe that Officer Belcher should be indicted or that it ever should go to th and jury or into a Common Pleas Court.

Q. When your deposition was taken here a few weeks ago, you didn't testify as to anything about her asking to have any other police officers involved in this thing besides Raymond Belcher; did you? A. Yes, sir, I did. I said Officer Belcher and others, if I remember my testimony.

Q. Did she name others? A. Yes, sir, she named his brother.

Q. Anybody else? A. I have no specific recollection of anyone else.

Q. At some stage of this interview, did you reach up and push a picture in her face? A. Yes, sir, I did. I was most ungallant and I should not have done so.

Q. Didn't you say first that the case was closed? A. Yes, sir, I am sure that I did, and I think I closed my file in a gesture at the time.

Q. Didn't she then repeat that it wasn't closed as far [p. 472] as she was concerned. A. Yes, sir.

Q. Then didn't you say you will never get it to Court? A. I was referring to an indictment of Officer Belcher.

Q. But your words were, "You will never get it to Court," weren't those your words? A. I can't say ex-

actly that those were or were not my words. She told me that she was going to have Officer Belcher and his brother, Lieutenant Belcher, indicted. I indicated that I did not think so.

Q. Pursuant to that statement, you said, "You will never get it to Court;" didn't you? A. I think I have testified that I was talking about grand jury and Common Pleas Court. Whether I used the exact words, "never get it to Court" or not, I don't know. I would not argue with you if you stated that's what my words were.

Q. That was what your words were just a while back on the deposition; wasn't it? It's just been two or three weeks ago. A. I think that you asked me a leading question and I said I don't disagree with you and I don't now, Mr. Lewis.

Q. You could have? A. I could well have said that.

The Court: Let's not chew that any more. That's been established.

Q. (By Mr. Lewis) I think your words were you—

[p. 473]

Q. (By Mr. Lewis) I hand you what's been marked for identification as Joint Exhibit 43 and ask you what that is? A. This is a letter written by me as director of the Department of Public Safety to Officer Raymond Belcher through the chief of police:

"Ray: The Board of Inquiry proceedings relative to the incident of March 1, 1971 at Jimmie's Cafe, 2338 Summit Street."

Q. What is the date of that letter, sir? A. The letter is dated April 8, 1971, sir.

Q. I believe you testified in your deposition that this letter of April 8, 1971 represented the actual closing of the case as far as your review of the case was concerned? A. Reviewing, referring to the last line

of the letter it states, "The board of inquiry is discharged and the case is dismissed," so the particular items that were under investigation by the firearms board of inquiry were closed officially with this letter.

Q. So the case wasn't officially closed on March 15th when you had the interview with the lady? A. That is correct.

Q. Calling your attention to the last, next to the last sentence of that summary, does it state as follows; that you resorted to deadly force only after all other courses available to you had been exhausted? [p. 474] A. In part it states that.

Q. Read the entire— A. "The inquiry is hereby closed with the specific finding that your actions were in the line of duty; your weapon was used only in self defense, and that you resorted to deadly force only after all other courses available to you had been exhausted."

Q. At that time had it been resolved where Michael Noe was shot, the location of where he was when the bullet entered his body? A. There were two possibilities and at that time, and even to this date, it has not been determined whether or not he was struck inside or outside the building. I don't think that will ever be resolved.

Q. There was considerable volume of testimony, statements in these reports? A. I am sorry. I didn't hear you.

Q. I will withdraw the question.

Did you ever run across a statement of Officer Belcher that he jumped up from the floor and chased Noe outside? A. Yes, sir, I am aware of that fact.

Q. How would you relate that matter to self defense? A. It is my understanding from the various

statements of Officer Belcher plus my own understanding from preparing [p. 475] this case, that after Officer Belcher and Mr. Noe were outside a struggle ensued.

Q. Did you have the opportunity to look at the coroner's report that indicated where the bullet that was found in Mr. Noe's body entered his body; what the cause of death was? A. I don't remember ever looking at the report. I remember discussing the matter with the doctor. I some times have problems with the medical terms in the various reports. It is my understanding that the bullet entered Mr. Noe's chest in the upper regions of the chest.

Q. Is it your understanding that it actually entered his heart? A. It is my understanding that it did enter the heart area; yes, sir.

Q. Does that help you as to resolving the place of the struggle, whether the struggle was before or after the shooting? A. I have a personal opinion if you want me to state that as to when Mr. Noe was actually shot in the sequence of time based upon that and several other things. If you want me to state that opinion, I would be more than happy to.

Mr. Crawford: Your Honor, any reference I think in this incident and also with Mr. Hughes to information that he has gotten subsequent as a result of preparation of the case I do not think is proper for examination. [p. 476] Any information that he had at the time he reviewed the matter, reviewed the file I think is proper matter. I think the question should be limited to that.

The Court: You are correct, Mr. Crawford, and it will be.

Mr. Taylor: May I approach the bench?

The Court: Yes.

(Thereupon followed a discussion off the record.)

Mr. Lewis: The plaintiffs have completed their examination of this witness.

The Court: Mr. Crawford.

Mr. Crawford: Mr. McGrath is going to cross-examine Mr. Hughes, if you would like to talk with him.

(Thereupon followed a discussion off the record.)

The Court: You may proceed, Mr. McGrath.

Cross-Examination

By Mr. McGrath:

Q. Mr. Hughes, in regard to the letter which you wrote to Officer Belcher, is that the letter you have in your hand? A. It is.

Q. You have alluded to certain portions of that letter. Would you read the whole letter. A. "Dear Officer Belcher.

I have reviewed the various materials forwarded to me [p. 477] by the chief of police consisting primarily of the statements, summaries, hospital files, progress reports, statements of fact, interim reports, use of force reports and other materials assembled in connection with the above-captioned incident. I have also reviewed the various reports issued by the Bureau of Internal Affairs.

After careful review of the above and following personal discussion with various members of the Board of Inquiry, the chief of police and internal affairs bureau, it is my finding that the discharge of your weapon was proper under the circumstances and that the injuries inflicted thereby were justifiable. Particular note is given to the fact that you attempted

to defend yourself with chemical mace prior to the use of your weapon.

It is further my opinion that at the time you discharged your weapon, you were in great peril, unable to retreat and ultimately could have suffered great bodily harm, or even death, as a result of the unprovoked attack upon you.

The inquiry is hereby closed with a specific finding that your actions were in line of duty; your weapon was used only in self defense, and that you resorted to deadly force only after all other courses available to you had been exhausted.

The Board of Inquiry is discharged and the case is dismissed." [p. 478] S/ James J. Hughes, Jr., Director."

Q. You signed that letter? A. I did, sir.

Q. Why did you reach that conclusion?

The Court: I think that the letter speaks for itself. He has given all the reasons in the letter why he reached that conclusion.

Mr. McGrath: Thank you.

The Court: Do you wish to withdraw the question?

Mr. McGrath: Yes, I will withdraw the question, Your Honor.

Q. (By Mr. McGrath) Mr. Hughes, are you familiar with the firearms review board? A. Yes, sir, I am.

Q. Would you tell what the purpose of that board is and was in March of 1971? A. The firearms review board was a new concoction at this time. It had come about because we had had a series of complaints against the police department on the investigation of the use of firearms.

At that time I asked the president of the Columbus Bar Association to appoint a special committee to

consider the use of force by police officers. They made several recommendations and most important of those was the creation of a board of at least officers of the rank of captain who would investigate [p. 479] any time a policeman discharged his weapon; that they would determine whether or not the discharge of that weapon was proper.

We put this plan into effect some time late in 1970. It would consist of three officers, three captains of the police department. They would consider the facts. They would then render an opinion which would be advisory to the chief as to whether or not the discharge of the weapon was proper.

The board has continued to the present date doing precisely this same thing.

Q. Was this board one which would convene with a formal hearing? A. No, sir, it did not work like a court. Basically it was the three officers would get together in most instances; they would not question witnesses at all. They would review the file.

Mr. McGrath: May I confer with counsel, Your Honor?

The Court: Yes.

(Discussion at defense counsel table.)

Q. (By Mr. McGrath) The firearms review board was set up pursuant to a general order? A. Yes, sir, it was.

Q. Would that have been No. 70-9D? A. From memory I can't testify as to which general order, but it was set up by a general order. [p. 480]

Q. Upon your review of the actions of the firearms review board in regard to this incident, was it your opinion that the firearms review board fulfilled its requirements under that general order? A. Yes, sir, and in fact I wrote a letter of commendation to Cap-

tain Taylor who was chairman of that board and indicated that I was completely satisfied with the way it had operated and suggested that the method that it had used in this particular incident could well serve as a model for future uses of this board, realizing that it was a new concoction at the time.

Q. Mr. Hughes, as safety director, have you ever had occasion to discipline police officers? A. Quite often during that period of time.

Q. Could you estimate any number? A. My estimation would be that I imposed punishment upon police officers or received resignations in lieu of punishment at about a rate of one a month during the period of time that I was safety director.

Q. Did you ever cause an officer to be fired? A. Yes, sir, I did on several occasions.

Q. Mr. Hughes, you have heard testimony during this trial that on approximately July 16, 1971 the plaintiff in this case, Casey Stengel, was arrested. Are you familiar as in your role as safety director with any of the circumstances [p. 481] surrounding the cause of that arrest? A. I am aware of the fact that Mr. Stengel—

The Court: Just come up here, gentlemen.

(Thereupon followed a discussion off the record.)

The Court: Do you wish to withdraw the last question, Mr. McGrath?

Mr. McGrath: Yes, I will withdraw the question, Your Honor. Thank you.

Q. (By Mr. McGrath) Mr. Hughes, in your capacity as safety director for the City of Columbus, were you frequently sued in Court as a result of being safety director and being a necessary defendant to any litigation involving the City of Columbus?

The Court: Do you object?

Mr. Lewis: Beyond the scope.

The Court: Sustained.

Q. (By Mr. McGrath) Mr. Hughes, have you in any way, either immediately after the incident involved in this case or at any time, ever agreed or made suggestions or had discussions with any of the other defendants in this courtroom which were in any way involved in an attempt to whitewash or cover up the truth of the occurrence of this incidence?

Mr. Lewis: Object. It's beyond the scope.

The Court: No, it is not.

If you are objecting, your objection is overruled.

Go ahead and answer that question. [p. 482] A. Thank you, Your Honor.

I certainly did not. If I became aware at any time of any attempt to do so, discipline would have been taken against those officers. Beyond that, it is my opinion that—

The Court: Just a minute. We don't want your opinion, Mr. Hughes. You have said that you never engaged in any way, manner, shape or form in any coverup. That's an adequate answer to the question. A. Thank you, Your Honor.

Q. (By Mr. McGrath) In your capacity as safety director, were you supervisory in terms of the chain of command over the chief of police? A. I was.

Q. And the Division of Police? A. I was.

Q. Did you at any time exercise any command influence over Chief Joseph or anyone in the Columbus Police Department to interfere with or obtain a certain desired result from the investigation of this incident? A. I absolutely did not.

Mr. McGrath: Thank you. I have no further questions, Your Honor.

The Court: Do you have any other questions, Mr. Lewis?

Mr. Lewis: Just a couple.

[p. 483]

Recross-Examination

By Mr. Lewis:

Q. Mr. Hughes, did I understand the questions of Mr. McGrath that you wrote the letter to the firearms review board after this investigation and suggested to them having reviewed the statement taken that this should be a model for future investigations? A. That is a fact, sir.

Q. Did you, of course, carefully review the one statement of Raymond Belcher that they took because that would be pretty important; didn't you? A. I did, sir.

Q. As an attorney you are familiar with what a leading question is? A. Yes, sir.

Q. That's a question; leading question is one that suggests the answer to it; is it not? A. Yes, sir, the question you just asked me is a leading question.

Q. However, in the courtroom where you are represented by counsel and you are under cross-examination, the scope of the questions is and the form is controlled by your counsel's objections and by the Court rulings; is it not?

The Court: Come up here, Mr. McGrath and Mr. Lewis. [p. 484]

(Thereupon followed a discussion off the record.)

The Court: Does that conclude your examination, Mr. Lewis?

Mr. Lewis: That concludes my examination.

The Court: You may leave the witness stand, Mr. Hughes.

* * * * * * * * *

APPENDIX

Supreme Court of the United States

October Term, 1975

No. 75-823

RAYMOND BELCHER,
Petitioner,

v.

CASEY D. STENGEL, et al.,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VOLUME 2 OF 2

Petition for Certiorari filed December 10, 1975
Certiorari Granted April 5, 1976

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-823

RAYMOND BELCHER,
Petitioner,

v.

CASEY D. STENGEL, et al.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

TESTIMONY OF BONNIE LOHMANN

[p. 560]

Thursday Afternoon Session,
June 13, 1974

BONNIE LOHMANN

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hughes:

Q. Would you please state your name? A. Bonnie Lohmann.

Q. On March 1, 1971, what was your address? A. 54 West Second Avenue.

Q. I am not sure the jury can hear you. Can you talk as loud as you can. I realize that you are somewhat nervous and small, but try and come up with a loud voice.

Bonnie, on March 1, 1971 at approximately 2:00 o'clock in the morning, when did you leave Jimmie's Cafe? A. As soon as I could get out.

Q. When you say "as soon as you could get out," as soon as you could get out of what? A. As soon as I could get out of the booth.

Q. Why did you leave Jimmie's Cafe? [p. 561] A. Well, because Ray had said before he got up out of the booth, he had told me to 'get the hell out of there.'

Q. Why did he tell you to get out of there? A. Because trouble was starting.

Q. At the time he told you to get out of there, had any shots been fired? A. No.

Q. When you actually did get out of there, had the shots yet been fired? A. Yes.

Q. Bonnie, let's back up a little bit and tell us your activities on Sunday, the 28th. What did you have planned? Did you have any plans to meet Ray or anybody else that evening? A. Yes.

Q. What were those plans? A. Well, John Hawk, Ray Belcher and I were going to go up to Jimmie's for a drink.

Q. Did in fact Ray come to your place to pick you up? A. Yes.

Q. Do you have any estimate of what time it was that that happened? A. Midnight or so.

Q. Then did you go to Jimmie's Cafe? A. Yes.

Q. Did anything unusual happen that evening? [p. 562] A. Yes.

Q. Before the unusual happening—

The Court: In Jimmie's Cafe or before they got to Jimmie's Cafe.

Q. (By Mr. Hughes) In Jimmie's Cafe. A. Yes.

Q. How long was it that you had been in Jimmie's Cafe, to the best of your estimate, before something happened unusual? A. Maybe a half hour.

Q. When you went into Jimmie's Cafe, did you know anybody in the cafe or the bar? A. Francis Compson and her husband.

(Thereupon the easel with chart thereon was set up.)

Q. Bonnie, would you direct your attention to the chart that the clerk has put up which originally was marked Defendants 1 and which I think now has been Joint Exhibit 78. Would you oreintate yourself to the particular area—Do you understand what the chart depicts at this time?

The Court: Can you see everything on that chart plainly? A. Yes but I kind of think the bar extends a little farther down than that, and it is a little bit wider than it looks.

Q. (By Mr. Hughes) Generally do you recognize that as a rather accurate description of Jimmie's Cafe on the evening [p. 563] that you were in there. A. Yes.

Q. Would you take the pointer which I will hand you and step up to the chart so that you can use the pointer.

Miss Lohmann, would you point out the booth in which you sat down?

A. (Indicating.)

Q. That basically is the middle booth? A. Yes.

Q. Could you point out in that booth roughly where each of the persons that were sitting there were?

The Court: That is in her party?

Q. (By Mr. Hughes) Yes, sir. A. (Indicating all.) I was here; Francis Compson was there; her husband was here; Raymond Belcher was here.

Q. There were other persons in the bar at that time? A. Yes.

Q. Would you roughly point out where they were? A. Well, there was a little barmaid, Marie, she was around, the bar, approximately sets in here (indicating

all) where Noe, Ruff and Stengel were sitting, and Agnes Morgan and her husband were approximately here, but I think the bar extends down a little farther.

Q. You think the bar moves towards the east a little bit farther than is shown on that drawing—I am sorry. [p. 564] A. West.

Q. Towards the west, towards Summit Street? A. Yes.

Q. Return to your seat for a moment, and with the Court's permission we will leave the chart there because I will use it a little later.

The Court: Yes.

Q. (By Mr. Hughes) During the time that you were seated there with the Compsons, were you engaged in conversation with them? A. Yes.

Q. Did you become aware of any other conversations in the bar? A. Yes.

Q. What did you become aware of? A. Well, one of the three of Noe, Stengel and Ruff said, "He is a cop."

The Court: Meaning who?

A. Well, the only cop in there was Raymond Belcher, and another replied, "No, he is not," and still perhaps another or one of the two said, "Yes, he is. I know him."

Q. (By Mr. Hughes) What next occurred that was unusual? A. Well, Agnes Morgan and Noe got in some kind of argument where he was really calling her some names, and he off and cracked her one across the face. [p. 565]

Q. Would you now step to the chart again and point out the approximate location of Agnes Morgan and Mr. Noe at the time that he did what you indicated he did. A. They would have been where the piano is

and this last booth, forget the bar, but where the piano is and this last booth, they would have been approximately here (indicating.)

Q. So, they would have been as you're describing it about even with the last booth? A. Southeast, yes.

Q. What occurred next? A. Mr. Morgan got up and he got knocked down to the floor and Noe began stomping him.

Q. Do you know who knocked him down? A. I don't remember.

Q. Whereabouts was Mr. Morgan knocked down and being stomped by Mr. Noe? A. He was being stomped right here (indicating.)

Q. You are indicating a position opposite the third booth and slightly into the second booth? A. Yes, sir.

Q. When I say third booth, I am counting as if the first booth is the one nearest Summit Street. A. Yes.

Q. While Mr. Morgan was on the ground and being stomped by Mr. Noe, where was Agnes Morgan [p. 566] A. I don't know.

Q. What were Mr. Ruff and Mr. Stengel doing at this time? A. Ruff, I believe, was still at the bar and Stengel was somewhere over near the juke box, in that general area.

Q. Whereabouts is the juke box again, if you would indicate, or is it the juke box that is indicated on the chart as the juke box? A. Perhaps not that far, but in that general area.

Q. Maybe you better go ahead and point to it, to where you think that Mr. Stengel was at this time. A. Stengel was approximately here (indicating) like this diagram— He was approximately here (indicating) and Ruff at the bar was approximately here (indicating.) They was at the bar.

Q. What happened next? A. Ray started to get up, said something about calling the police, and me to get the hell out of there. He stood up. He had his tear gas mace in his hand, and there was a movement, you know, Noe stopped stomping Morgan and came toward him.

At the same time Ruff jumped him and Stengel jumped him.

Q. What happened to Officer Belcher at that time? A. He was hanging on, so they kind of pulled him, pushed him backwards, and he grabbed ahold of the coat rack and held onto it, and told them to get off of him. [p. 567]

Tear gas had been sprayed. They didn't get off of him. They pulled him; they pushed him; they tripped him, you know, and he let go of the hat rack and was pulled and pushed over towards the juke box where he fell onto the floor.

Then Ruff and Stengel commenced stomping him.

Q. Would you stand up and demonstrate to the jury what you mean by the word stomp. A. They were kicking too. Now, a kick would be a thrust of the foot, you know, kick (indicating.)

To stomp, see that heel, to stomp is to stomp (indicating.)

Q. If you will return to your seat.

By this time Officer Belcher is on the ground and Ruff and Stengel are stomping him; is that your testimony? A. Yes.

Q. What next happened? A. They continued stomping him.

Q. At this time where was Officer Belcher's head? A. South.

Q. Would you return to the chart and take the pointer and point to the approximate position that you would think his head would be? A. His head was here (indicating.)

Q. In other words, you are indicating— A. Feet up (indicating.) [p. 568]

Q. Between the juke box and a table? A. Yes.

Q. Where was his back? A. On the floor.

Q. Where were his legs and other extremities? A. North.

Q. For approximately how long did Messrs. Noe and Stengel continue to stomp him? A. Ruff and Stengel?

Q. I am sorry; Ruff and Stengel. A. Minutes.

Q. Was that plural or singlar? A. Plural, a couple, a few.

Q. Can you describe in your own words the extent of the beating? A. He was getting kicked and stomped. He was getting pretty bad.

Q. Was he fighting back at all? A. No. He was trying to cover up. He was trying to protect himself.

Q. Did he continue to have the tear gas in his hand at this time? A. No.

Q. Where had you seen the tear gas? A. When he had gotten out of the booth, when Noe stopped [p. 569] stomping him, Morgan approached him when the other two jumped him, and that's when it was sprayed at the booth.

After that, I don't know what happened to it.

Q. The point of your story now; Officer Belcher is on the ground, his head is up by the juke box, his back is on the ground.

What did you next observe? A. Ruff came down on him and started using his fists and Raymond came up

and this time Stengel was still stomping and kicking him. Raymond came up and shoved him off.

Q. By him you mean Ruff? A. Yes, and—well, Ruff, you know, started—he went back and he started kicking, and he came right back and he got shot.

Q. At that time Ruff got shot? A. Yes.

Q. What happened next? A. Noe stopped kicking Morgan and started in that direction; Stengel got shot.

Q. Started in the direction of Officer Belcher? A. Yes.

Q. Then Stengel got shot? A. Yes.

Q. Then what happened? A. Then the tear gas got me. [p. 570]

Q. The tear gas got you? A. Yes.

Q. Did you see anything else? A. No.

Q. Then what happened as far as you are concerned? What did you next do? A. After everything was quiet, you know, I just had to get out. I couldn't stand it, you know. I left.

Q. Did you have any difficulty getting out of the bar now that the fight was over? A. Well, Agnes Morgan—she passed out by the booth.

Q. Did you have to remove her to get out of the booth? A. No, I just stepped over her.

Q. Was the main action of the fight at or near the opening of your booth? A. Noe on Morgan.

Q. You said that you heard how many shots? A. For sure, two. I saw two and that third shot was probable but that's when I threw myself back in the booth and that tear gas just kind of slapped me in the face.

Q. You saw two shots. How many did you hear? A. Three.

Q. You heard three. In sequence to the best you can, saying bang, could you give the sequence of how long the shots were spaced so that the jury has some feeling of how quick or [p. 571] how slowly the shots were fired? A. (Rapping on witness chair.) Knock—knock—knock. I am not going to say bang.

Q. In other words, somewhat rhythmically? A. Yes, in sequence.

Q. Bang; bang; bang? A. Well, that was too fast, the last one. It was bang; bang; bang.

Q. You saw the first two of these shots? A. Yes. (motion of head in the affirmative.)

Q. She can't get a nod. She needs an answer; yes or no. A. I am sorry, yes.

Q. How would you describe for the ladies and gentlemen of the jury the beating that Officer Belcher was receiving. A. Anyone of those kicks, anyone of those stomps, like his head and his neck, anyone could have killed him.

Of course, you know, I am not medical, but anyone could have killed him, maimed him, anything. They were just with such force and violence.

Q. Bonnie, after you were able to get out of the booth, did you leave the bar? A. Yes, I did.

Q. Where did you go then? A. I went two blocks north to a telephone booth. I called a cab; waited for it, and got home.

Q. Did you have any conversation with anybody after the [p. 572] last remark that was made to you by Officer Belcher before the shooting? A. Could you ask the question again?

Q. Let me put it this way: Did you talk to Officer Belcher again after the time when you just indicated to us that he told you before the shooting to get the

hell out of the booth? A. No, not that I remember because I was gone.

Q. You got out of there as soon as you could and took a cab home? A. Yes, I did.

Mr. Hughes: I think that's all I have, Your Honor.

The Court: You may cross-examine this witness.

Cross-Examination

By Mr. Taylor:

Q. Does the chart appear distorted to you, this one? A. From where I was sitting, the bar seems to extend more down than it does now.

Q. As a matter of fact you had previously testified that this slapping incident between Mrs. Morgan and Noe took place down by the piano, between the piano and the bowling machine; didn't it take place between the piano and the bowling machine? A. I would say the end of the third booth and the piano or the end of the third booth. [p. 573]

Q. That was some distance from you; wasn't it? A. No.

Q. It was not some distance? A. No.

Q. This diagram appears to appropriately represent that distance then? A. I don't understand what you mean.

Q. The distance from the booth that you were sitting in to where the piano and the bowling machine is appears to be correctly represented on this diagram? A. There was a booth and then the piano, yes.

Q. Do you know whether or not the first slap took place from Agnes Morgan or from Mr. Noe? A. I saw Noe striking Agnes Morgan.

Q. Did you see Mrs. Compson then get up to go help down there? A. I really don't know what happened to her.

Q. Did there come a point when Raymond got out, Raymond Belcher got out of the booth and went to get Noe? A. He stood up. He got out of the booth, but I can't say that he went to get Noe.

Q. What would he went to get Noe mean to you in your mind if you had previously said it?

Mr. Hughes: Objection, Your Honor.

The Court: Overruled.

A. I don't understand what you are asking. [p. 574]

Q. (By Mr. Taylor) If he went to get Noe, it would mean he took some steps towards Noe; isn't that correct? A. Not necessarily.

Q. Wasn't your version one time that he reached in his pocket, that he took out his tear gas, and he stepped out of the booth and he went to get Noe; he sprayed the tear gas and it went sort of over everybody in the bar? A. When he got out of the booth, there was commotion. Noe went toward him and his hand came up and I am sure that Noe kicked him, not once, maybe twice or three times, and was jumped immediately by the other two.

Q. The incident with Noe and Mr. Morgan was taking place down near the piano also; wasn't it? A. No. Mr. Morgan was right here (indicating) where I could get out of the booth and Noe had ahold of the hat rack to give himself leverage to stomp that man.

Q. Do you remember having had your testimony taken at the preliminary hearing in this case over at the Municipal Court Building?

The Court: Do you remember that?

Q. (By Mr. Taylor) The first hearing. A. The police station, you mean?

Q. Yes. A. Yes.

Q. I will ask you if you remember, on Page 66 of that [p. 575] transcript, Line 12, the question:

"Go ahead. What did Raymond do?

Your answer, "He got up with the tear gas and went to spray Noe."

Do you remember that question?

A. Yes.

Q. And then the question—

The Court: Ask her if she remembers the answer too.

Q. (By Mr. Taylor) Do you remember giving the answer? A. Yes, I do, I think.

Q. (By Mr. Taylor) "Did he spray Noe?"

Your answer, "Yes. he sprayed the tear gas."

Do you remember that answer?

A. Yes, he sprayed the tear gas?

Q. Yes. A. Yes.

Q. Now, prior to extracting this tear gas and spraying it in that bar, did he identify himself as a police officer? A. No.

Q. But he was going to get Noe and he was going to get him with the tear gas; isn't that correct? A. I think that I assumed that's what he was going to do, but like he just stood up.

Q. Well, you were sitting in the same booth with him. [p. 576] A. He did not say I am going to get Noe. He did not say that.

Q. He didn't say anything then; did he? A. Yes, he did.

Q. When the tear gas sprayed, started—and there is no doubt in your mind that it started moments after he got out of that booth; isn't that correct? A. Yes.

Q. I mean there is no doubt in your mind that the mace was out moments after he got out of the booth and did not first contaminate the air in the middle of the fight? A. I don't understand your question.

Q. You saw spraying of tear gas just after he got out of the booth; isn't that correct? A. Just after he got out of the booth he was jumped by Stengel and Ruff too.

Q. We will worry about that later. I am worried about the tear gas right now. Just as he got out of the booth, the air was contaminated with tear gas from his cannister; isn't that your observation at that evening? A. Not immediately.

Q. How much less than immediately? A. Well, when he was jumped and when Noe went toward him, it started coming out.

Q. It was out then right away; it did not come out when [p. 577] he was in the fight over by the juke box for the first time? A. No, it didn't come out over by the juke box. I didn't see it over by the juke box.

Q. In fact your testimony would be that he did not even have the tear gas cannister in his hand when he was over by the juke box; isn't that correct? A. Yes.

Q. You never heard him identify himself as a police officer when he left the booth? A. No.

Q. Don't you remember Mrs. Compson going down to try and settle this little slapping incident herself? A. I really don't remember.

Q. But it could have happened? A. It could have.

Q. You say you saw these shots as well as heard them? A. Two of them.

Q. Those would be the bullets that hit Stengel and Ruff? A. Not in that order.

Q. Ruff and Stengel? A. Yes.

Q. Which way was Stengel facing at the time you saw that firearm discharge? A. North.

Q. In regards to Belcher, was he facing him and kicking [p. 578] him at that time, or as you characterize it? A. Belcher was on the floor.

Q. You saw the gun, his hand; was he, Belcher, laying on the floor and did you see him acquire possession of this firearm? A. I really don't remember how he got it or, you know—

Q. But there came a point in time in which you saw the weapon in his hand? A. Yes.

Q. You saw the weapon at the point in time that it discharged? A. Yes.

Q. If you saw the weapon, you also saw Stengel? A. Yes.

Q. You also saw Belcher? A. Yes.

Q. Where was Stengel in relationship to Belcher at that point in time? A. Still kicking and stomping at his head and shoulders.

Q. Right at his head and shoulders down there kicking and stomping him? A. I don't know about down there. His legs were down there and his feet.

Q. What would you say was the distance between the firearm that you observed in the hand of Mr. Belcher and, say, the [p. 579] chest of Mr. Stengel. A. I couldn't even begin to give an approximation of feet or inches. I am not a good judge of distance.

Q. You can judge if that's a foot. Was it less than a foot? A. At least.

Q. I mean was Belcher still on his back? A. Yes, he was.

Q. Facing up and Stengel was over him, stomping him? A. Yes.

Q. At his head? A. Yes.

Q. You are sure that Mr. Stengel wasn't shot in the back? A. I didn't say that.

Q. If you observed him over him and kicking him at the time the firearm discharged, where did the bullet strike? A. It struck up his back.

Q. Up his back. Then Stengel was not facing him?

Mr. Hughes: Objection, Your Honor. I think she has testified that Mr. Stengel was facing north.

The Court: Let me ask this witness a question. Miss Lohmann, when Mr. Belcher was on the ground, was on the floor, wasn't he when he got his gun out; is that right? A. Yes. [p. 580]

The Court: At that moment, and just an instant before, you heard the first or the second shot fired, was Casey Stengel stomping Mr. Belcher?

A. When Ruff was shot, he was still stomping Mr. Belcher.

The Court: Was Ruff shot before Stengel?

A. Yes.

The Court: You saw Ruff shot before you saw Stengel shot?

A. Yes.

The Court: Stengel was shot in or within a second or two after Ruff was shot; is that right?

A. Yes.

The Court: Was Mr. Belcher on the floor at that time?

A. Yes.

Q. Was he on his back? A. Yes.

Q. Was Stengel stomping Belcher when Belcher shot Ruff? A. Yes.

Q. Was Mr. Belcher's head facing up or was he facing down or was he on the side? What was the position of his head with relation to the floor. A. When?

Q. When he shot Ruff and a second or two later shot Stengel? [p. 581] A. When he shot Ruff his head would have been up like this (indicating).

Q. Was it up off the floor? A. It could have been.

Q. In relation to Belcher's head, let's say Belcher was facing this way, was Stengel facing toward him or facing away from him or facing to the side. A. Stengel was over him.

Q. Was over him. A. He would have been on the floor. Raymond —

The Court: Belcher would have been on the floor Stengel was standing—Was Stengel facing Belcher toward him, looking down into his face and stomping him, or was he stomping him turned away from him?

A. He was down on him like here is his head down here (indicating), his head would have been here (indicating).

Q. As best you remember, was Casey Stengel facing Belcher when he was shot? A. When Ruff was shot, Noe made the move, stopped kicking Kyle Morgan and went toward —

Q. I want to come back. You have just testified that Belcher shot Ruff first and a second or two later he shot Stengel. When he shot Stengel, was Stengel standing up and Belcher was on the floor; correct? A. Yes. [p. 582]

Q. At that instant, just the instant before Stengel was shot, was Stengel standing over Ruff, standing over Belcher facing him, or was he faced away, or was he faced to the side? A. That's what I am saying. You see, after Ruff was shot, that's when Noe stopped kicking and stomping Morgan and went toward them.

When I turned back, that's when Stengel got it up the back, but he was still stomping him when Ruff got shot.

Q. So, you are saying now that when Stengel got shot, he was not facing Belcher? A. Yes.

The Court: Go ahead.

Q. (By Mr. Taylor) If he wasn't facing him, he wasn't any longer administering any of these alleged stompings to him; isn't that correct? A. When Ruff got shot, Noe made the move and I was watching Noe and then turned to see the shooting up his back. Noe his heel was still on Raymond.

Q. Oh, his heel was still on Raymond. A. You know, like the collarbone, the shoulder.

Q. Belcher's laying on the floor and as you now describe it, Stengel has his foot on his collarbone like this (indicating) and his back is to him; is that the picture you are trying to present now? A. Back side. [p. 583]

Q. Well, Stengel standing erect or bent over? A. He was going —

Q. He was going like this (indicating)? A. You know more about fights than I do. You are a man.

The Court: Let me say something to you. We don't want any observations like that. It isn't necessary.

The Witness: Yes, sir.

The Court: All you have to do is to answer the questions of counsel to the best of your ability.

Go ahead.

Q. (By Mr. Taylor) You say you recollect that the heel was placed on Mr. Belcher's collarbone and the back of Mr. Stengel was exposed to Belcher; isn't that correct? A. Yes.

Q. That is the story. How much distance — Where was Belcher's arm; how high was it elevated above or below the ground at that point in time? A. I don't remember.

Q. Are you sure you really observed the incident you have just testified to? A. Yes, I did.

Q. Could you explain to me how his end of the weapon, if he had it the way you just testified to, could be within six inches of the flank of the back of Mr. —

Mr. Hughes: I object, Your Honor. [p. 584]

The Court: I will sustain your objection to the form of that question.

Q. (By Mr. Taylor) That is your testimony as I just stood here and went through it and you are sure you remember that.

Mr. Hughes: Your Honor, I don't know what he means.

The Court: I will sustain your objection to that question also.

Q. (By Mr. Taylor) You heard three shots in that bar; is that your testimony now? A. Yes, I saw two.

Q. You saw two; you heard three? Now, did you hear any additional shots at a later point in time? A. I could have. I don't recall.

Q. There came a point in time when you finally extracted yourself from this booth; isn't that correct? A. Yes.

Q. You walked outside; did you? A. Yes.

Q. Did you go out the front door or the back door? A. I went out the front door.

Q. Did you see anything unusual when you went outside? A. Unusual?

Q. Yes. A. Well, when my eyes cleared, Noe was laying on the [p. 585] ground and asked me to help him to get him out of there before the police came. Is that unusual?

Q. Did you have a conversation with Noe? A. I didn't say anything.

Q. Does the chart correctly portray the location of his body as you best remember it? A. Yes.

Q. That's some 14 feet from the door; isn't that correct? A. I don't know. It is a sidewalk.

Q. You came out the door. A. I don't think it's that wide, but if you say so.

Q. You saw Noe out there and he appeared to have some kind of wound; isn't that correct? A. I don't recall seeing a wound.

Q. You never heard any shots that transpired outside? A. I don't recall any.

Q. You heard three shots and in relatively quick order, and that was the only firearms you heard discharged that evening? A. To the best of my knowledge; to the best of my memory.

Q. At the time you finally extracted yourself from the booth, there was no longer any commotion; was there? A. Things had quieted down. That's why I was getting out of there.

Q. You had been a witness to a double homocide; isn't that correct? [p. 586] A. Yes.

Q. You were in the company of an off duty police officer? A. Wait a minute. You said double homocide. Homocide is murder. I would say a double shooting.

Q. You just got out of the booth, walked out to the front door, saw another man who requested help outside and walked up to a phone booth. A. Sir, the last thing in my mind was get the hell out of there and that's what I was doing. I had to get out.

Q. Why did you have to get out then? A. Because the tear gas was burning.

Q. All the other witnesses were around; you got outside, you got fresh air there; didn't you? A. Yes. Yes, I did.

Q. Did you see Raymond Belcher outside? A. I don't recall seeing him.

Q. Never came back to talk to Raymond Belcher whatsoever? A. No, I did not go back into the bar. I just went up the street.

Q. If you didn't see Ray Belcher outside, did you see him outside? A. Not that I recall.

Q. Then you must not have left the bar until after he came back in? A. I wouldn't have seen him.

[p. 587]

Q. Well, there is only one door to the front of this establishment; isn't there. A. Yes.

Q. At the point in time that you went outside, Belcher was no longer outside? A. As far as I know, he was not outside.

Q. So that means that when this man went out the door and traversed this area of a least 14 feet, Belcher was outside, something happened out there, and Belcher evidently came back in before you got outside? A. He probably did because I don't recall seeing him outside. I don't recall seeing anybody as I made my way out the door either.

Q. As a matter of fact Belcher came back in; didn't he? A. He probably did. It was his voice I heard on the telephone calling the police, but I did not see him, sir.

Q. Then after this incident happened outside, you were still in the bar at the point of time you heard Raymond Belcher go to the pay phone on that south wall and call for the police? A. I was what?

Q. Still in the bar at that point in time. A. No, I was on my way out.

Q. Which means Mr. Belcher came back into the bar? A. But I did not see him come back in.

Q. You heard him? [p. 588] A. Yes, or I heard whose voice I thought was his.

Q. Did you see him picking up casings inside the bar? A. No, sir, I did not.

Q. Didn't even talk with him? A. No, sir.

Q. Had you been dating Ray Belcher? A. We had gone out to a few places on occasion with each other.

Q. With each other in the presence of some times Mr. Hawk? A. John was there, yes.

Q. But on many occasions, it was just you and Ray; isn't that correct. A. On occasion, yes.

Q. You were 20 years old at this time?

Mr. Hughes: Objection, Your Honor.

The Court: Come up here, gentlemen.

(Thereupon followed a discussion off the record.)

The Court: There is an objection to the last question on the record. I will overrule the objection.

The question is: Were you 20 years old at this time; that is in 1971. A. Yes.

The Court: You are 24 now?

A. Twenty-three, 24 this year.

Q. (By Mr. Taylor) You went two blocks, made a phone call [p. 589] and got a cab and went home; is that right? A. Yes.

Q. You lived in an apartment by yourself at that time? A. I lived by myself, yes.

Q. You had socially also been out with Mr. Hawk; isn't that correct? A. Yes.

Q. Was Mr. Hawk your friend or was Mr. Belcher your friend? A. They are both friends of mine.

Q. Then there came a point in time that evening when Mr. Hawk appeared at your apartment; isn't that correct?

The Court: Come up here, gentlemen.

(Thereupon followed a discussion off the record.)

The Court: Come up again, gentlemen.

(Thereupon followed another discussion.)

Q. (By Mr. Taylor) Do you remember having given a statement at 6:42 A.M. on the morning of this incident after you arrived at police headquarters? A. I didn't know what time it was.

Q. Do you remember having given a statement at that time? A. Yes.

Q. I will ask you if you remember this question, and I want to confine it to this mace and when it came out:

"Q. What took place when he got up out of the booth?" [p. 590] Do you remember that question? A. Yes.

Q. I will ask you if you remember the answer you gave at that time, "Tried to use the tear gas on the blonde guy and was spraying it at him."

Do you remember giving that answer that morning just a few hours after this incident? A. Yes.

Q. Is that the correct version of what happened when Raymond got out of the booth? A. Well, Noe went toward him, yes, he did spray the tear gas.

Q. Do you remember the question:

"I want to know what happened at the bar. Did somebody hit someone?

"The blonde guy hit the woman with the glasses across the face."

Do you remember that question and the second sentence I read to you was — A. Yes.

Q. "and she let out a yell and her husband came off the blond guy, came at him. The blond guy hit him, knocked him down. Raymond got up with the tear gas."

Do you remember that answer: A. Yes. [p. 591]

Q. We don't have any stomping at your feet at the booth in that statement; do we? A. I guess not, but, sir —

Q. This is the statement that you gave just a few hours after the incident; isn't that correct?

The Court: Come up here.

(Thereupon followed a discussion off the record.)

The Court: Do you have any other questions?

Mr. Taylor: That concludes the cross-examination, Your Honor.

The Court: Do you have any other questions, Mr. Hughes?

Mr. Hughes: No questions, Your Honor.

The Court: You leave the witness stand and leave the courtroom, please.

Call your next witness.

Mr. Hughes: Your Honor, Mr. McGrath will question Mrs. Compston.

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Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division

(Title omitted in printing)

TESTIMONY OF FRANCIS COMPSTON

[p. 591]

* * * * * * * * *

FRANCES COMPSTON

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McGrath:

Q. Would you state your name, please. [p. 592] A. Frances Compston.

Q. Mrs. Compston, are you married. A. Yes, I am.

Q. To whom. A. James Compston.

Q. Are you familiar with a cafe known as Jimmie's Cafe on Summit Street in Columbus, Ohio? A. Yes, I am.

Q. You were there on March 1, 1971? A. Yes, I was.

Q. What was your purpose in being there? A. I was a barmaid.

Q. You were employed by Jimmie's Cafe? A. Yes.

Q. How long had you worked there? A. I had worked there just about a year and a half.

Q. Do you remember what hours you were working that day? A. I went in about 4:00 and it was approximately 12:30 or 1:00 o'clock.

Q. Did your husband arrive there that night? A. Yes, he did.

Q. Or that morning rather. A. Yes.

Q. Do you remember approximately when he arrived? A. Approximately about 15 minutes before I got off work. [p. 593]

Q. Do you know Raymond Belcher, Mrs. Compston? A. I know him as a customer, and that's all.

Q. Do you know Bonnie Lohmann? A. As a customer.

Q. Were they there that night? A. Yes, they were.

Q. Do you remember approximately when they arrived? A. Approximately 20 minutes or something like that before. Maybe I saw them once or twice a month. I mean they weren't customers that came in every night.

Q. Did you see Mr. Casey Stengel there that night? A. Yes, I did.

Q. Were you sitting with Mr. Belcher and Miss Lohmann? A. Not when the incident happened, no.

Q. Were you at any time? A. Yes, I had sit down for just a few minutes to say hello.

Q. Was your husband with you at that time? A. My husband was sitting in the booth waiting for me.

Q. Mrs. Compston, can you see the diagram here which is a joint exhibit, Joint Exhibit 78. Can you see that all right or would you like to come down off the stand and look at it? A. Wait until I see what you are gonna ask me. Yes, I can.

The Court: Stand over to the side so you are not [p. 594] between the chart and the members of the jury.

Q. (By Mr. McGrath) Could you take this pointer and point—Is that a fair and accurate representation of Jimmie's Bar as you know it to exist? A. Well, there is a shorter distance from where you come off the sidewalk.

Q. It would appear shorter than is on the chart? A. Right.

Q. Is the interior of the bar basically a fair representation with the noted things of the bowling machine, piano and the bar? A. Here is the bowling machine (indicating). Here is the juke box (indicating) and where the two bodies was laying Raymond Belcher was between.

Q. Wait for the question, Mrs. Compston.

Could you just tell me what booth you were sitting in? A. I wasn't sitting in a booth.

Q. When you first told me that you did sit down with them for a minute, where was that? A. That booth (indicating) the second booth in from the piano.

Q. The second booth in from the piano or from the wall which is closest to Summit Street? A. Yes.

Q. Did anything unusual occur that night, Mrs. Compston, [p. 595] anything unusual happen that night? A. Yes.

Q. Could you tell me what that was? A. It was a dispute between a lady —

Q. Do you know who the lady was? A. I can tell you her name, Agnes Morgan.

Q. Go ahead. A. — and her husband got up to take the dispute —

Q. Could I back up a minute. When you said there was a dispute, who was involved in the dispute? A. The blonde headed boy and I will try to pronounce his name wrong — Noe.

Q. That's fine. A. It was something about her and they were by the bowling machine when this happened,

something about her, and she slapped his face and he shoved her and she hit the piano and naturally her husband got up to take her part.

Q. When you say she hit the piano; did she go off her feet? A. Yes.

Q. She was knocked down? A. She was shoved down.

Q. What's her husband's name? A. Kyle Morgan.

Q. What did he do then? [p. 596]A. He naturally got up to take her part.

Q. What ensued then when you said take her part; do you know what happened then? A. The two boys were stomping him.

Q. What two boys? A. The two dark headed boys. This is as close as I can come to tell you, and that is when Mr. Belcher got up out of the booth.

Q. When you say they were stomping him, could you tell me what you mean by that? A. Not kicking; stomping. When you stomp somebody, you stomp them with your whole foot.

Q. What, if anything, happened next after the stomping? A. I don't know which one — and I can't say which one— when Belcher got up, he got hit and that's where he landed, by the juke box, and that table.

Q. When you say he, you are referring to Belcher got hit? A. Yes.

Q. What happened next? A. He used his mace as far as this goes.

Q. That's a tear gas mace? A. Right.

Q. What happened to Officer Belcher after he fell down or was knocked down by the two boys? A. He was using his mace and then he used his gun. [p. 597]

Q. Was there anybody around him after he fell down? A. Yes.

Q. Who? A. The two dark headed boys.

Q. What were they doing? A. They were using their boots on him.

Q. What do you mean by that, Mrs. Compston? A. Their shoes, boots. I mean like if I had a pair of boots on, and then he started shooting.

Q. When you say they were using their boots, what do you mean by that; were they kicking him? A. They were kicking him; they were stomping him, and he didn't have room to get up. There is not enough room.

Q. How was he positioned if you could describe it? A. He was laying with his head to the juke box and there was a table there. He was laying between the table and the juke box and there is no way that somebody could get up.

Q. What happened next? A. After the tear gas really cleared out of there — and I am not real sure what happened outside — I can't tell you that.

Q. You said you heard shots. Could you describe that, please. A. They were in a matter of seconds.

Q. How many shots did you hear? [p. 598] A. I heard two or possibly three. I mean, look, I can't be sure. There could be between two or three.

Q. What did the boys do after you heard the shots? A. They were both laying on the floor, and the one, the other one either started out the door or tried to pull Belcher out the door, one of the two. I can't even tell you exactly the truth about that.

Q. Did you feel any effects from the tear gas? A. Yes.

Q. Where were you located when you heard the shots and when Mr. Belcher got knocked down. A. I was half-way from the front to the back of the bar. I

was gonna try and get to the telephone and where the telephone was at is up to the front. There is no way that I could call the police.

Q. Did you see Mr. Belcher after the shots were fired? A. Yes.

Q. Where was he? A. He came back in. I had already put the dime in the telephone and I was calling the police, and I did not see him until we were at the police station. It was some time about 5:00 o'clock in the morning.

Q. Did he then call the police? A. He is the one that did call the police.

Q. You put the dime in the phone? [p. 599] A. I did.

Q. Did you ever see Bonnie Lohmann after the shots were fired? A. No, I didn't.

Q. Did you see her in the bar afterwards? A. No.

Mr. McGrath: Excuse me, Your Honor.

(Discussion at defense counsel table.)

Mr. McGrath: I have no further questions at this time, Your Honor.

The Court: You may cross-examine, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. As I understand your testimony, you first noticed the air was contaminated with tear gas at some point in time after Mr. Belcher was knocked down over by the juke box? A. Right.

Q. You never observed any tear gas prior to that time? A. No, I didn't.

Q. You were located in this bar at the time that this thing transpired at a distance towards the back of the bar at that time.? A. I was half way back to the bar.

Q. At any time were you struck in these altercations? [p. 600] A. No.

Q. Noe never struck you? A. No.

Q. Hadn't you went back to try and break this little thing up on your own? A. I had asked Agnes Morgan to not create more trouble. She had created trouble in the neighborhood before.

Q. You were back there just before this incident arose too; right, with Agnes? A. No, I was not with Agnes.

Q. I mean once the slapping — did you observe a slapping incident? A. Yes, I did.

Q. Is that when you left your booth. A. I hadn't been in the booth that long.

Q. But you were never struck at any time? A. No, I was not.

Q. Some time after 5:00 you gave a statement; isn't that correct? A. Yes, I did.

Q. Before I go to that, so I understand your testimony at this time, Raymond, just prior to the shots, was located in the area of the juke box; is that right? A. Yes, he was.

Q. Was he on his back? [p. 601] A. Yes, he was.

Q. With his — Where were his legs? A. They were laying east from the front door right by the juke box.

Q. He was just laying on the floor over in that area? A. Right.

Q. This statement, I will ask you if you remember having given one at 6:07 A.M. on March the 1st; ask you if you remember this statement? It would have been at police headquarters and Mr. Hopkins was asking the question:

"Do you know what happened when he left the booth? A. Everything —

Do you remember that question? A. Yes, everything happened so fast but I still knew what was going on.

Q. Your answer. I will read your answer:

"Everything happened so fast, if you want my opinion he was knocked down by the juke box, right up to the front."

Do you remember that answer? A. Yes.

Q. "Did you see who struck him?" "A. No. I am going to tell you, the way it was going so fast."

"Q. Is that your answer."

A. My answer was that either one of the two — It was [p. 602] either one of the two dark headed boys. Now I can't tell you which one it was."

"Q. After he was struck, you say he was knocked to the floor?" "A. He was."

"But in this period of time you didn't see any tear gas in Mr. Belcher's hand and he was not spraying any tear gas?"

"You don't have to see — no, I didn't see, but I know where it came from because if you have a place closed up, you use a mace in here, you will breathe it."

Q. How long did this incident of stomping — Did you see at any time anybody stomping Mr. Morgan? A. Yes, they both had him down.

Q. They both had who down? A. Kyle Morgan.

Q. Who is they? A. As far as I can be real sure, it was one of the dark headed boys and the blonde headed boy.

Q. This incident was, with the Morgans, supposed to be happening where? A. By the third booth nearer the piano.

Q. By the third booth nearer the piano; isn't that correct? A. Right.

Q. It was probably really between the booth and the

piano? [p. 603] A. No, no, no. It was past the first booth.

Q. Now you got me confused. Where did the Morgan incident that you say there was two people on him transpire at? A. Where the piano set. We didn't have booths back on this side. I mean your diagram is blowed up so big to where Jimmie's Cafe was. You take it —

Q. This booth, this booth, or this booth (indicating)? A. There was only three booths there.

Q. This is — A. Take the third booth.

Q. This one (indicating)? A. No.

Q. The one towards the front door. A. The middle one then. What I count from the piano.

The Court: Mrs. Compston, you just step down and take the pointer and point out which one you mean and let the witness hold the pointer.

A. This is your piano. This is where you come in the entrance (indicating all). You got this — This is the first booth from the piano. This is your second booth, and I will say right in there.

The Court: Take your seat again, Mrs. Compston.

Q. (By Mr. Taylor) How much time elapsed between when you seen Mr. Belcher struck and he was on the floor over there and the gun was discharged? [p. 604] A. It would be a matter of seconds. I said minutes before but things like this don't happen, because I mean it is like you have an automobile accident; it only happens in a matter of seconds.

Q. Then the next question that I wanted: "Did you see anybody kick at him or strike him after he was on the floor?" A. Yes.

Q. Did you remember your answer at that time? A. Yes.

Q. What was it? A. The two dark headed boys.

Q. I will read you this answer and ask you if you remember —

The Court: Come up here.

(Discussion off the record followed.)

Q. (By Mr. Taylor) We will read this answer to you and ask you if you don't remember having given this answer on the morning to Sergeant Hopkins:

"Q. Did you see anybody kick at him or strike him after he was on the floor. A. I can't be honest with you, yes. Everything was going chairs was going and people was stomping. I suppose to say yes but, no, but I mean —

Q. Did it happen that quickly? A. It didn't happen that quickly but I want to ask you [p. 605] a question.

The Court: No. You don't ask questions. The counsel asks questions. A. Okay. I will answer a question.

The Court: Just a minute. Is there a question on the record?

Mr. Taylor: Yes, sir.

The Court: All right. Ask your next question.

Mr. Taylor: We have concluded then with that.

The Court: You have concluded?

Mr. Taylor: Yes, sir.

The Court: Do you have any questions, Mr. McGrath?

Mr. McGrath: We have no questions.

The Court: You are excused, Mrs. Compston.

Call your next witness.

Mr. McGrath: Mr. Compston.

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Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

TESTIMONY OF JAMES COMPSTON
JAMES COMPSTON

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McGrath:

Q. Would you state your name, please, sir. A. James Compston.

[p. 606]

Q. What's your address, Mr. Compston? A. 402 West Third.

Q. Are you married? A. Yes.

Q. To Frances Compston? A. Yes.

Q. The woman who just testified here? A. Yes.

Q. Before you? A. Yes.

Q. Has your wife been ill lately? A. Huh?

Q. Has your wife been sick lately? A. Yes, she has.

Q. Quite sick? A. Yes, quite serious.

Q. Are you familiar with Jimmie's Cafe, Mr. Compston? A. Yes.

Q. Were you there on March 1, 1971? A. Yes.

Q. What was your purpose in being there? Why did you go there? A. To walk over there to get my wife to walk her home.

Q. Your wife worked there. A. Yes, she did. [p. 607]

Q. Do you remember approximately what time you arrived? A. Approximately —

Q. Do you remember what time your wife got off work? A. Approximately about 1:30.

Q. Was Raymond Belcher there that night? A. Yes.

Q. Was he there with a young girl? A. Yes.

Q. Were you sitting with him that night? A. Yes, I was.

Q. Mr. Compston, can you see this exhibit, this diagram? A. Yes.

The Court: Why don't you let the witness take the pointer.

Q. (By Mr. McGrath) I want you to look at that diagram, Mr. Compston, and after you do, will you tell me whether or not that is a fair representation of how Jimmie's Bar is laid out; how it looks? A. Yes.

Q. Can you read the various things in there as they are written; the bar, the piano, the bowling machine? A. That's the bowling machine. (Indicating.)

Q. The juke box? A. The juke box is over here (indicating all,) the table [p. 608] here and the phone right here (indicating).

Q. That fairly looks like Jimmie's Bar? A. Yes.

Q. Where were you seated? A. Right here (indicating).

Q. Were Agnes and Kyle Morgan there that night? A. Yes, they were.

Q. Did anything unusual happen that night? A. Well, she slapped the blonde headed boy's face.

Q. Where was that? A. This was right in here (indicating).

The Court: Mr. McGrath, are you going to ask him some more questions about that?

Mr. McGrath: Yes.

The Court: Mr. Compston, just step down in the

same place you were before and just come around this way so you are not between the jurors and the chair, and Mr. McGrath will ask you questions, and if it is necessary to point to the chart, you point to the chart.

A. Sitting here (indicating) and the blonde headed one walked over to Agnes and said something to her and she slapped him. Then he shoved her back. She landed back here (indicating) at the piano and then slid down through the floor.

Well, Mr. Morgan jumped up and grabbed the blonde headed one and they landed over on the floor about in here [p. 609] (indicating.)

Q. What happened then with Mr. Morgan and the blonde headed boy? A. Huh?

Q. What happened next with Mr. Morgan and the blonde headed boy? A. He was on the floor and the blonde headed one was stomping at him, and then Belcher, he got up, and one of the two black headed ones grabbed him and they all went over in between the tables and the juke box.

Q. What happened over there, Mr. Compston? A. They was stomping him.

Q. Mr. Belcher was on the floor? A. Yes.

Q. The two boys were over him? A. Yes.

Q. What do you mean when you say stomping? A. Like you take your foot and stomping against the floor towards his head.

Q. Were they striking him, hitting him, with their feet? A. With the feet.

Q. Was there any tear gas in the bar that night, Mr. Compston? A. Yes, there was.

Q. When did you first notice the tear gas? [p. 610] A. When it started burning my eyes.

Q. What was going on when your eyes started burning? A. Then after that, I heard some shots.

Q. How many shots did you hear? A. Three.

Q. Do you know where the shots came from; where were they fired from? A. Just between the table and the juke box where Belcher was laying on his back.

Q. Where were the two dark haired boys when the shots were fired. A. One of them landed his head towards the bar and the other one's head about between the first and the second booth laying slantwise.

Q. When the shots were fired, they were over by Officer Belcher? A. Yes, they was.

Q. What were they doing? A. Huh?

Q. What were they doing then just before the shots were fired? A. They was still bouncing Belcher around. He come up off of there shooting.

Q. Where were you when this was going on? A. I was in the middle booth. [p. 611]

Mr. McGrath: I have no further questions, Your Honor.

The Court: You may cross-examine, Mr. Lewis.

Cross-Examination

By Mr. Lewis:

Q. Mr. Compston, what direction were you facing as you were sitting in the booth. A. Facing towards the bar.

Q. Would that be east or west; do you know? A. I was on the north side of the room, facing south.

Q. But the seats face each other, east and west; don't they? A. Oh, I was facing east when I was sitting in the booth.

Q. Bonnie Lohmann was sitting opposite you? A. Yes.

Q. So, she was facing west? A. Yes.

Q. How high are the backs of those booths up there; were they — at that time? A. That I don't know.

Q. Did they come up about to your shoulders? A. Yes.

Q. Did you hear—when this incident erupted, where was your wife? A. Like I said, the blonde headed one and the woman got [p. 612] into it; Belcher —

Q. That's not my question. I will ask it again.

Mr. Compston, when this incident started, where was your wife located, was she in the booth? A. She set there for a few seconds and then she walked over and told Agnes to calm down because we didn't want no trouble in the bar.

Q. Was that after Agnes had slapped the boy? A. Yes.

Q. You didn't see your wife slapped or anything? A. No, my wife didn't.

Q. What happened ne. after your wife spoke to Agnes? A. After she spoke to her, she was on the east side of the piano.

Q. Your wife was on the east side of the piano? A. Yes, she was going back to get stuff ready for the next morning.

Q. Was there a coffee machine in this place? A. Yes.

Q. Would you take the pointer and locate approximately the area of the coffee machine? A. Right in this district here (indicating).

Q. Would it be correct to say that your wife was back at the coffee machine? A. No, she was standing here and she started to walk back [p. 613] to here when she heard the fireworks going off.

Q. You are indicating that she had started to walk back toward the coffee machine; is that correct? A. Yes.

Q. How far was — Was she close to the entrance between the two, the division between the two bars

that are shown there? A. She was standing right in here (indicating).

Q. Right between the piano and the bowling machine; is that it? A. The piano and the bowling machine, between them.

Q. Do you have an estimation of how far that was from where you were sitting? A. No, I don't.

Q. But at that point in time she had started back toward the coffee machine; is that correct A. Yes.

Q. Did you hear Ray Belcher say anything to Bonnie Lohmann? A. No.

Q. As this incident started? A. No.

Q. Ray was sitting right in the booth with you; wasn't he? A. He was sitting on the outside and I was sitting on [p. 614] the inside.

Q. You didn't hear him tell her to — words to the effect, get the hell out of here? A. No.

Q. Was anybody closer — A. No.

Q. — to them than you were? A. No.

Q. You were facing east prior to this time. Where were the boys that were involved in this thing located? A. The three booths on the end.

Q. Mr. Compston, would you point, prior to this incident starting up, where the boys had been sitting? A. You want me to point it out?

Q. Would you take the pointer and show just where you think they were. A. (Indicating.)

Q. You were facing — A. Towards the piano.

Q. Were you facing in the general direction they were? A. Yea.

Q. Where you could see them; is that correct? A. I seen the three boys, yes.

Q. Did you hear them say anything about Ray Belcher or anything about him being a cop? [p. 615] A. I didn't hear them say a thing.

Q. Just before this incident erupted, Bonnie Lohmann sitting in a booth facing the front door; wasn't she? A. Yes.

Q. Do you remember seeing her after the shooting occasion? A. No.

Q. When did you next remember seeing Ray Belcher, if did, after the shooting? A. After the shooting he got up off the floor and what I don't know, the blonde headed one was dragging him out, or he was trying to hold him from going out the door.

Q. What did you see the blonde headed boy do in this incident? A. I seen him shove Mrs. Morgan back towards the piano after she slapped his face.

Q. What did you see him do next? A. Then Mr. Morgan, he jumped up and grabbed him and they went over towards the booth and Morgan was on the floor and he was stomping towards his head.

Q. Do you know whether he hit Morgan's head? A. No.

Q. At that time was Noe facing east? A. Yes, he was facing east.

Q. What did you see next? A. I seen the two black headed ones had Belcher over [p. 616] between the piano and the table and they was going at it pretty good and he come up, come up firing.

Q. Over between the piano and the table? A. I mean the juke box and the table.

Q. Did you see Noe around Belcher at that time, the blonde headed boy. A. He started towards the door.

Q. He had started towards the door?

The Court: That is the blonde headed boy started toward the door? A. Yes, the blonde headed one.

The Court: Is that after Belcher fired two shots?

A. Yes.

The Court: Go ahead.

Q. (By Mr. Lewis) Mr. Compston, what was your employment at that time? A. What was my employee?

Q. Employment. A. I was working for Ross-Willoughby.

Q. What time did you go to work? What was your regular working hours. A. It is 8:00 to 6:00 at that time.

Q. Starting at 8:00 A.M. in the morning? A. Yes. [p. 617]

Q. You had come in, I believe you said, shortly before this happened to walk your wife home? A. Yes, because she was scared at that time after a colored person pistol-whipped her.

Q. Do you remember anybody talking to you at Jimmie's Cafe after the incident? A. No.

Q. What do you next remember after the incident? A. Well, I seen Belcher come in and make a phone call.

Q. Did you see anything about any money being put into the phone? A. My wife had the money in the phone, was gonna dial, and then Belcher called downtown.

Q. Did he come back in from the outside? A. Huh?

Q. Did he come back in from the outside? A. Yes.

Q. What did you see after that next, after that phone call that you remember? A. The policemen was all over that place.

Q. How many would you estimate came in? A. Well, off hand I can't tell you.

Q. Can you estimate how many? A. It was approximately four cruisers and two paddy-wagons. [p. 618]

Q. Do you remember seeing Mr. Stengel lying on the floor? A. Stengel; one of the blackheaded boys was laying on the floor and and the other black headed boy was laying on the floor.

Q. Do you remember how long they were there on the floor?

The Court: Mr. Lewis, I am going to take a recess of 15 minutes at this time. You may leave the stand during the recess, Mr. Compston, but don't speak to anybody. Don't talk to anybody.

The Witness: What's that?

The Court: We are going to take a recess now for 15 minutes. You may leave the witness standing during this recess but don't talk to anybody about this case during the recess.

Ladies and gentlemen of the jury, please remember what I told you earlier: Don't talk about this case when you are in recess.

Don't form or express an opinion about the case.

The clerk will recess the Court for 15 minutes.

(Recess taken.)

Q. (By Mr. Lewis) I believe you said that you didn't talk to anybody at the cafe after the incident at all? A. I didn't talk to nobody after the shooting.

Q. Where did you go after the shooting? A. I went back at the restroom of the bar. [p. 619]

The Court: Ask him the direct question.

Q. They take you down to the city police station? A. Yes.

Q. Who was with you? Were you with somebody? A. They took my wife down in the cruiser.

Q. With you? A. Yes.

Q. Did you give a statement down there? A. Yes.

Q. Do you remember how long you waited to give this statement? A. Well, we didn't get out of there until 6:00 o'clock in the morning.

Q. Did you give your statement just before you got out of there? A. I gave my statement down to the

police station; then they turned us loose about 6:00 o'clock in the morning.

Q. Was that a short statement?

The Court: Come up here, gentlemen.

(Thereupon followed a discussion off the record.)

Q. (By Mr. Lewis) On that morning do you remember this question being asked you and this answer being given:

"Q. Did you see anyone kick Ray with their feet or stomp on him? A. No, I didn't." [p. 620]

Do you remember that? A. No, I don't.

Q. You don't remember that question and that answer? A. No, I don't.

Mr. Lewis: That's all.

The Court: Are you through with this cross-examination?

Mr. Lewis: Yes, Your Honor.

The Court: Do you have any other questions, Mr. McGrath, of this witness?

Mr. McGrath: I have no questions, Your Honor.

The Court: Mr. Compston, your testimony is completed now. You may leave the witness stand.

The Witness: Can I leave?

The Court: You can leave the courthouse now, yes. Call the next witness.

Mr. Crawford: Agnes Morgan.

Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

TESTIMONY OF AGNES MORGAN

AGNES MORGAN

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Crawford:

Q. Mrs. Morgan, you presently live in Columbus; is that [p. 621] correct? A. Right.

The Court: You are Agnes Morgan?

A. Yes, sir.

Q. (By Mr. Crawford) If you can recall back to February 28th of 1971, and also the early morning hours of March 1, 1971, do you recall where you were? A. Yes.

Q. Where were you? A. Jimmie's Cafe on Summit.

Q. Do you recall what time you arrived there? A. It was around 3:00, 4:00 something around that time. I am not positive.

Q. Who were you with? A. Kyle, my husband.

Q. During the course of your time at Jimmie's Cafe, can you recall briefly what you were doing? A. We drank beer and eat and played the bowling machine. We knew most everybody down there.

Q. Had you been drinking quite a bit that day? A. Well, not exceptional but what I mean that length of time it would be quite a bit.

Q. About 1:30 in the morning and this would be on March 1, 1971, do you recall any incident in there with respect to any of the patrons and yourself? [p. 621] A. Yes.

Q. Could you relate to the jury what that incident was. A. We started with Mike and Casey.

Q. What? A. Michael Noe and Mike and Casey —

The Court: Just a minute, Mrs. Morgan. (Thereupon followed an admonition to witness to keep voice up.) A. When the three boys came in, Bob and Casey and Mike, we started playing the bowling machine. We had been playing off and on, different ones of us, before, but we played with them a couple games and an argument started.

Q. Who did the argument start with? A. Between Mike and I.

Q. Do you recall why the argument was started. A. Over we were playing for a drink and over the game, both combined.

Q. What happened then? A. He just started calling me names and yelling at me.

Q. What did you do? A. I asked him to stop and he said just because I lost now you want a drink instead of a beer, and I said, well, I will pay the difference, you know, just give me the 40 cents and I will pay the difference, and he just kept on and I just back handed him like that (indicating.)

Q. You slapped at him; right. [p. 623] A. Yes.

Q. What did he do after that happened? A. He hit me.

Q. Then where did you go? A. He just slapped me and when he slapped me, of course he was standing in between me and Kyle standing on my right, and I did like this (indicating), and when he slapped me, I just went over and it knocked me out and that's it.

Q. Do you think you were unconscious at that time? A. I don't know anything. I didn't hear anything else.

Q. What's the next thing you do remember? A. Kyle and a policeman getting me up off the floor.

Mr. Crawford: I have no further questions, Your Honor.

The Court: You may cross-examine.

Mr. Lewis: We have no cross-examination.

The Court: That completes your testimony, Mrs. Morgan. You may leave the witness stand.

Call your next witness, Mr. Hughes.

Mr. Crawford: Kyle Morgan.

Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

TESTIMONY OF KYLE MORGAN

[p. 624]

KYLE MORGAN

carried as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Crawford:

Q. Would you please state your name. A. Kyle Morgan.

Q. You presently reside in Columbus? A. Yes.

Q. Taking your thoughts back to March 1st and February 28th of 1971, do you recall where you were? A. As far as I know, I was in Jimmie's Cafe.

Q. Do you remember what time you got to Jimmie's Cafe? A. In the early afternoon.

Q. Who were you with? A. Agnes Morgan, my wife.

Q. She is your wife; right? A. Yes.

Q. About 1:00 o'clock or 1:30 do you recall any incident that took place in Jimmie's Cafe that involved you? A. I don't recall of an incident. I don't recall waking up or coming to my senses on the floor.

Q. Can you recall anything before that period of time? A. No.

Q. Had you been drinking that day? [p. 625] A. Yes, I had.

Q. Would you consider that you were drinking a lot? A. Quite a bit.

Q. What is the thing that you do recall about that evening? A. At the time that I came to my senses on the floor, I was being kicked by a couple of individuals — at least there was more than one — I was being kicked in front and back.

Q. Do you know where you were when you were being kicked? A. You mean location within the bar?

Q. Yes. A. It was between the piano and the end of the bar, somewhere in that area.

Q. When you say you were being kicked, do you recall how you were being kicked? A. Yes, I was kicked like in the leg here (indicating) and the chest and the back and the back of the head.

Q. Did you have any bruises the next day? A. Yes, I did.

Q. You pointed to your thigh. Where else did you say you had bruises? A. Practically from here (indicating) to the toe to my head.

Q. Did you have any bruises in the groin area? A. Yes. [p. 626]

Q. Do you recall anything else about that night? A. I blacked back out some time during this kicking and I blacked out again and then I guess — I don't know how long afterward, but anyway a uniformed policeman was helping me up off the floor.

Q. So, you do remember that you were on the floor when you were being kicked; is that correct? A. Yes, that's correct.

Q. You were being kicked by two persons you said? A. More than one. I couldn't say two or three or more; more than one.

Mr. Crawford: Thank you.

I have no further questions, Your Honor.

The Court: Mr. Lewis.

Mr. Lewis: Could we have just a moment, Your Honor?

The Court: Yes.

(Thereupon followed a discussion at plaintiffs counsel table.)

Cross-Examination

By Mr. Lewis:

Q. Did you see some policemen come into the cafe after that? A. I didn't see them come in. Like I said, one was [p. 627] helping me, assisting me up from the floor is the first that I recall.

Q. Did they take you to any hospital for any emergency treatment? A. No, sir.

Q. Where did they take you, if they did? A. I assume it was to the police station where they took our statements.

Q. How long after they took you down there was your statement taken; do you remember? A. I don't know the exact time. I was there until approximately 7:00 o'clock in the morning and it was taken during that time.

Q. Did you receive any medical attention there at any time? A. No, sir.

Q. Did you have any major visible marks about your person at that time, your face or anything like that? A. At that particular time I really don't — didn't notice. The following day I noticed it. I was sore in spots and I noticed I had bruises.

Q. Did you give a statement down at the police station before you left at 7:00 o'clock? A. Yes, sir, I did.

Q. I will ask you if you remember this question and this [p. 628] answer being given at that time:

"Q. Were there more than one person there that you had an altercation with? A. No, not with me."

Do you remember giving that statement at that time? A. No, I don't recall it.

Mr. Lewis: That's all the questions.

Mr. Crawford: Nothing further, Your Honor.

The Court: Your testimony is completed, Mr. Morgan. You may leave the witness stand.

Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

TESTIMONY OF RAYMOND BELCHER

[p. 638]

Friday, Morning Session,
June 14, 1974

RAYMOND BELCHER

called on his own behalf, having been first duly sworn, testified as follows: [p. 639]

Direct Examination

By Mr. Hughes:

Q. Would you please state your name. A. My name is Raymond L. Belcher.

Q. What is your occupation? A. I am a police officer of the Columbus Police Department.

Q. How long have you been so employed? A. Fourteen years the 16th of December this year.

Q. You were a police officer on March 1, 1971? A. Yes, sir.

Q. Officer Belcher, I believe that you have been in the Court during the entire case with a few minor exceptions; is that correct? A. That's correct.

Q. Officer Belcher, on March 1, 1971, as you were laying on the floor at Jimmie's Cafe, having passed out due to a beating, having received a further stomping, what thought was in your mind?

(Mr. Taylor arising.)

The Court: Just a minute. Come up here.

(Thereupon followed a discussion off the record.)

The Court: Do you wish to strike the last question Mr. Hughes?

Mr. Hughes: I will strike the last question, Your Honor. [p. 640]

Q. (By Mr. Hughes) Officer Belcher, would you state what arrangements you had for Sunday evening, February 28th and the early morning of March 1st? A. On that date, February 28th, I had made arrangements to meet Miss Lohmann who lived at 54 West Second Avenue, and Officer Hawk, both my friends at Jimmie's Cafe some time after midnight.

Q. What did you do in furtherance of that plan? A. Some time after midnight I drove from my home to Miss Lohmann's apartment, picked her up and drove directly to Jimmie's Cafe.

Q. Approximately what time did you arrive at Jimmie's Cafe? A. We arrived there about 1:15 or 1:20 A.M.

Q. What happened or what did you observe as you went into the cafe? A. As we entered the bar, I observed, looking around, I observed probably ten or 11 people inside the bar. Seated at the bar there were three young men; I believe one of them had a full beard, long dark hair, wearing blue jeans or dark trousers and combat boots.

One was a man about my size, blonde haired, wearing a white shirt, black pants cut off about four inches above the ankle and wearing what I call Cuban style shoes. They have the large heel on them. [p. 641]

The third man at the bar was a man about 22 years old, large man. I believe he was wearing what is known as Army combat boots.

Further down the bar from him was seated a man about, male, white subject, about 45 years old, and I believe that where the bar is separated, the bar itself is in two sections; right where the bar is separated there was an older man who got up and left within just a moment or two after I entered the bar.

There was also an older lady there who I came to know as Agnes Morgan. There was a lady behind the bar. Her name was Marie, I believe that she is just a cleanup lady, and she was behind the bar.

There was James Compston and his wife Frances also inside the bar. I believe James Compston was seated in the second booth as you enter the front of the bar.

Q. Did the three gentlemen that you first described ever become known to you by name? A. Yes, they did.

Q. Who were the three people? A. The blonde haired man generally about my size was known to me as, later became known to me as Michael Noe. The biggest young man in the place became known to me as Robert Ruff, and the other gentleman was Casey Stengel.

Q. Did you know any of these three gentlemen prior to [p. 642] that incident that evening? A. I don't recall ever seeing them in my entire life.

Q. Were you acquainted with any of the other persons in the bar? A. Yes, I was.

Q. Who were they? A. Mr. and Mrs. Compston.

Q. What was your relationship with Mr. and Mrs. Compston? A. I was aware that Mrs. Compston's son works for the Clerk of Courts and that I knew her as the manager of the bar.

Q. You did not have a social relationship or anything like that with the Compstons? A. No.

Q. Did you know the Morgans? A. No.

Q. Had you met the Morgans to the best of your ability prior to this time? A. No, sir.

Q. Was there anybody in your company as you went in the bar? A. Yes, Miss Lohmann was in my company.

Q. Would you describe; would it be fair to describe Miss Lohmann as a girlfriend at this time? A. Yes.

Q. As you entered the bar with Miss Lohmann, was Officer [p. 643] Hawk with you? A. No, sir.

Q. I believe your testimony previously was that you were to meet him. At any time did you meet Officer Hawk at that bar? A. No, sir, not that night.

Q. Yes, limiting it to that night. A. No, sir.

Q. As you went into the bar, what occurred? A. As we entered this bar, I did stop at the door and make a point to observe the activity that was going on inside the bar before we actually seated ourselves.

Q. Why did you do that? A. Due to my past experience as a police officer.

Q. Could you just briefly detail what that past experience was? A. Yes, sir. I have worked as a police officer; I have worked every cruiser assignment in the City of Columbus, plus I have driven every ambulance cruiser, worked the radio room, the detective bureau, worked the information desk, and I walked the beat on High Street, or I was walking the beat on High Street at this time and had been for the past four and one-quarter years.

Q. In walking a beat on High Street, where did you walk from to what was the limits or the paramater of your beat? [p. 644] A. Sir, this district is known as the Short North area, that is known among the police officers as the toughest walking district in the City of Columbus or Franklin County.

Q. What are the geographical limits of this beat?

A. The area runs both sides of High Street, Union Station or Goodale Street north to King Avenue or Fifth Avenue.

Q. Are there any bars in this area?A. Yes, sir. At that time I visited in my tour on that street probably 30 bars every evening.

Q. In walking the High Street — Strike that.

Approximately how many walking posts are there in the evening in the City of Columbus?

The Court: I don't understand, Mr. Hughes. Walking posts did you say? Do you mean foot patrolmen; is that what you mean?

Mr. Hughes: Yes. A. I believe at that time there were only three walking districts in the city, or four.

Q. (By Mr. Hughes) A minimum? A. Yes, sir.

The Court: Did you say districts? A. Yes, they are known as districts, sir.

The Court: How many patrolmen would be in each district? A. We walk in pairs.

[p. 645]

Q. (By Mr. Hughes) So, on a typical evening in the City of Columbus, there would be either six or eight walking patrolmen? A. That's correct.

Q. You were one of these walking patrolmen? A. Yes, sir.

Q. Once you had, for want of a better term, made a sizeup of the bar when you entered, what did you do next? A. After I observed the people inside the bar and the atmosphere of the bar, I walked over and spoke to Mr. and Mrs. Compston and we — Miss Lohmann sat in the booth beside Mrs. Compston; I sat down beside James, and I deliberately placed Miss Lohmann facing me. I placed myself so that I could observe everyone in the bar.

Q. Officer Belcher, were you on or off duty at this time? A. Sir, I was off duty.

Q. When was the last time you had been on duty with the Columbus Police Department prior to this incident? A. I had worked Saturday night, the previous night, and had gone off duty at 4:00 A.M. in the morning.

Q. So, it had been 4:00 A.M. Sunday morning? A. Yes, sir.

Q. In order to complete the record, when would you normally next have gone to work? A. My next tour of duty would begin on Tuesday evening at 8:00 P.M.

[p. 646]

Q. So, you were off duty from 4:00 A.M. on Sunday morning until 8:00 P.M. the ensuing Tuesday; is that correct?A. Yes, sir.

Q. Your days off would have been Sunday and Monday at that time? A. Yes, sir.

Q. Officer Belcher, after you had joined the Compstons, had sat down, what next occurred in the bar? A. Drinks were ordered and brought to the table. I believe Mrs. Compston delivered a drink for both Miss Lohmann and myself. I think she had a bottle of beer and I ordered a highball or a whiskey and 7-Up.

Q. Then what happened? A. We sat in the booth and was discussing Mrs. Compston's health. I believe she stated to us that she had recently broken a leg on the ice and had only taken the cast off her leg a couple of days previous, and we were talking about that.

Q. Then what happened? A. The young blonde haired man that I know now as Mike Noe approached the table and asked if any one at the table had any change, any dimes for the bowling machine, and I replied that he was welcome to any change on the table there that he could find that would suit him.

Q. Then what happened? A. We had no change, no dimes on the table, and he turned [p. 647] and walked back to the bowling machine and proceeded to play a

game with a lady I later became known to me as Agnes Morgan.

Q. Then what happened? A. Some type of an argument broke out between Noe and Agnes. Mike Noe was yelling and screaming at her. He cursed her, using every filthy word that I think I could have heard. This went on for about a minute.

Her husband Kyle Morgan paid no attention to the argument between Agnes and Mike at this point. He merely sat at his seat at the bar, sat on the barstool, did not turn around or pay any attention to the argument at that point.

After this continued for about a moment, Frances Compston stated to me that — not to get involved; that she knew the boy, or something to that effect, and that she would settle the argument.

She got up out of the booth and approached Mike Noe who was still arguing with Agnes. She tried to calm the people down, but it had no effect on them.

Suddenly, or Mr. Noe continued to curse Agnes. She did slap his face and she was immediately knocked to the floor by Mike Noe.

All this time Mr. Morgan paid no attention to the argument. I don't know whether he was used to this sort of thing or not, but — and I made no effort to get involved up until that time. [p. 648]

Agnes was knocked to the floor; Kyle Morgan then did get up. I assume it was to get up to defend his wife from Mike Noe. Kyle stood up from the stool, turned around to go towards Noe; the man I knew as Mr. Ruff immediately stood up and knocked Kyle Morgan to the floor with a blow from his fist.

Both men then began to beat and stomp on Mr. Morgan. This took place right between the bar and the

bowling machine. Agnes Morgan was on the floor screaming. Kyle Morgan, who was I believe too intoxicated to even defend himself, was being beaten and stomped by two men.

At that point I realized that I could not let this scene continue any longer and I made up my mind that I was absolutely one way or the other going to arrest all three men — correction, at least two of these men.

Mr. Stengel at this point hadn't gotten involved in anything at all. He had done nothing whatsoever and had left his seat at the bar and was standing by the juke box by the front door.

Mr. Ruff, after about a moment or a minute of kicking and pounding on Kyle Morgan, stepped away from him and stood or half stood at a barstool observing me.

As I looked over my right shoulder to the front door of the bar, I saw Casey Stengel standing by the juke box as if he had some change in his hand and was going to select a song on the juke box, or play the thing, but Casey was looking [p. 649] towards me.

Robert Ruff was observing me and Mike Noe was still kicking on Mr. Morgan.

He was standing by the end of the booth there by the piano in the bar, holding on to something on the side of the bar or the booth. I don't know whether it was a booth itself or a coat rack, but he was viciously and with a great deal of violence and force kicking Kyle Morgan about the head and the face.

I told Miss Bonnie Lohmann that — and I don't know whether she actually heard me or not — but I did tell her that I was going to call the police and if trouble started to run and get out of there.

Miss Lohmann is not the — The reason I informed her of this, she is in a very, really poor physical health.

She has a plate in her right arm. She has an iron rod in her hip.

The Court: Do you object to this?

Mr. Taylor: Yes, sir.

The Court: I will sustain your objection. You can delete that.

Q. (By Mr. Hughes) Don't talk about Bonnie's health. Go on with the story. A. I told Bonnie that if a fight started, to run; that I was going to call the police. [p. 650]

I took my tear gas cannister from my pocket, put it in my hand, and in half-croached positions, slid out of the booth. My attention at that time was to walk directly to the front door of Jimmie's Cafe, go through the door, outside, go out onto the sidewalk and use the phone booth which is located just about 20 feet from the front door of that bar.

My intention was not to call the police from inside. I felt at that time that I would never be allowed to make that call. As I stood up from the booth, Mr. Stengel ran from the juke box, he jumped right on my back, locked his arm around my neck and I was nearly thrown to the floor.

I believe I had reached a standing position. I twisted my face around to Mr. Stengel and I said, Let go of me."

Mr. Stengel began throwing punches, attempting to strike me with his fist, and attempted to throw me to the floor. I grabbed ahold of the side of the booth and again told him to let go of me.

Mr. Ruff ran across the floor at that point and I was fighting both men. I was tripped or thrown on top of a small table there by the front of the bar itself, I think they are known as cabaret or cafe tables, they are very small tables, maybe two feet square.

My back went over this table. My head struck the juke box, and I recall being kicked for a moment after that. I was [p. 651] kicked several times and then there was a moment of darkness where I could neither feel nor hear anything. I don't know whether I was unconscious or apparently I was, but how long I was unconscious I have no idea. It could have been ten seconds; it could have been ten minutes.

As I looked up from the floor with my legs up over a table, I could see nothing but feet and fists. I was being kicked in the face and the head by at least two men.

At that time I tried to get up off the floor. I literally tried to pull myself up off the floor by using the men's clothing that were on top of me. I at one point had a man's belt in my hand and tried to drag myself up off the floor by his belt buckle, so I could get up off the floor and defend myself.

I was kicked first one direction, then the other direction. I continued to try to get up off the floor. I was getting tired. I was beginning to lose.

At that time somewhere in this struggle my tear gas was kicked out of my hand. I had been spraying it, trying to spray directly into these men's faces from the floor but somewhere during the fight the tear gas was stomped from my hand.

As I began to realize that I wasn't gonna be able to get myself off the floor, I reached for the pistol that I carried in my waistband in my pants. At that time I was carrying a .32 Browning automatic, and the gun was not there. [p. 652]

I was still being kicked and stomped. I put my arms, my left arm over my face to shield my face from these kicks, and looked across the shiny barroom floor to see if the pistol was lying there some place.

The gun was not there. The thought went through

my mind, oh, God, if these men, whoever they are, find that gun on the floor, they will kill me with my own weapon.

I felt the pistol underneath my back, still being kicked and stomped. I brought the weapon around in my right hand and shoved backwards to get these men off of me and I fired three shots straight into the ceiling, or straight into the mass of bodies that were on top of me.

Two men fell to the floor, one man, the young man I know as Mike Noe, ran out the door. I got onto my feet and chased Mr. Noe outside. I did catch up with him. We struggled. Mr. Noe was struggling violently with me as if to escape. I struck Mr. Noe with the pistol across the face.

This struggle took place on the sidewalk in front of the bar directly in front of the large front window of Jimmie's Cafe. As I struck Mr. Noe, I was facing the front of the bar and the gun went off I believe as it struck his forehead or as my arm came forward. I still couldn't say when it happened.

As the gun went off, I heard a lady scream inside. She was screaming, my God, my God, I have been hit. I have been [p. 653] hit.

I believed at that moment that the bullet had gone through the window and I had shot or maybe killed somebody inside. I didn't know who. I only knew it was a woman screaming.

Mr. Noe was still hanging on to me and I twisted him around and he collapsed onto the sidewalk.

Q. Officer Belcher, you have testified without my asking you any questions for what I would estimate probably ten minutes and have told a rather lengthy story, have you had occasions in the past from the witness stand to have told this story before. A. I believe so.

Q. Just detail for the jury how many times you have done so? A. I believe this is the fourth time that I have been to Court on this, sir.

Q. In addition to the times that you have been to Court and told this story, were you asked to tell this story by other persons on other occasions? A. Yes, sir, I believe I gave at least two statements to the police department, the detective bureau.

Q. Did you have occasions to tell each of defense counsel the story on more than one occasion?

The Court: Do you understand the question? A. Yes, I do. I don't believe that I have ever actually [p. 654] stated to any of counsel the story.

Q. (By Mr. Hughes) Officer Belcher, I am going to go back and cover a couple points in the story as you have told it. Do you have recollection of when you first began firing your tear gas mace? A. Yes, sir, I do.

Q. When was that? A. As I stood up from the bar, I had the cannister in my hand and the gas began spraying actually before I intended it to. The cannister was faulty. I don't know what was wrong with it, but it went off in my hand as I stood up.

Q. How is it supposed to operate? A. At that time we were issued a tear gas cannister which is available at different places in the city. You can buy it; private citizens own this cannister. It appears to be an aerosol type can and it has a button on top which if depressed allows the gas to escape.

Q. You say this was faulty. What happened? A. The gas was ejected from the cannister in a dust form.

Q. How should it have been ejected? A. It should have been ejected from the cannister as a stream of liquid, much as a water pistol would do.

Q. You say it did eject in a dust form. Can you be a little more specific or a little more descriptive of that?

[p. 655] A. It was as if someone had thrown a handful of talcum powder through the air.

Q. Officer Belcher, from the time you were on the floor until the time you fired the shots, with the exception of that time that you were blacked out, approximately how long were you on the floor? A. I don't know.

Q. Can you give us any estimation? A. I would say that I was on the floor at least a minute being stomped.

Q. Officer Belcher, I hand you what has been marked for purposes of identification as Joint Exhibit 72 C and D which are photographs according to the notation that were taken on 3-1-71 at 6:30 A.M. I would ask you if you can identify those two exhibits? A. Yes, sir, I can.

Q. Do those photographs fairly and accurately represent your physical condition on March 1, 1971 at 6:00 A.M. in the morning? A. Yes, sir.

Q. Officer Belcher, I hand you what has been marked for purposes of identification as Joint Exhibit 71 and I would ask you if you can identify the signature that appears in the upper right-hand corner? A. Yes, sir, I can. [p. 656]

Q. Whose signature is that? A. That's my own.

Q. Where was this form prepared, to the best of your knowledge? A. Grant Hospital.

Q. In it it contains medical information concerning you; is that correct? A. Yes, sir.

Q. Would you read those portions of the form containing medical information about you and state whether that is what you told the person that prepared this form? Don't read the information.

Mr. Taylor: I will object, Your Honor.

The Court: Let me see that.

(Perusal of said document by Court.)

(Thereupon followed a discussion off the record.)

Q. (By Mr. Hughes) Don't read it out loud but to yourself. Read those matters concerning your complaints which appear on the form. Don't read it out loud; just read it to yourself. A. (Witness complies.) Yes, sir, I read it.

Q. Does that accurately describe the complaints as you told them to the doctor or nurse that made this form? A. Yes, it does.

Q. Officer, Belcher, would you leave your seat, pick up [p. 657] the pointer and approach the chart which has been marked as a joint exhibit. Would you point out to the ladies and gentlemen of the jury the tables that I think that you refer to as a cafe table, if they appear on the drawing? A. Yes, sir, these are the tables in this corner. It would be the southwest corner of the bar, approximately ten feet from the front door.

Q. Would you point out the juke box that you referred to? A. This is the juke box (indicating.)

Q. Would you point out, as best you can with the pointer, where your head, your back and your legs were in reference to that diagram when you were first thrown to the floor. A. When I was first thrown to the floor, I can recall my body striking the front of this juke box. I next recall my head being jammed into the corner between the juke box and the wall. My legs or part of my legs were up over this table which had been overturned. I was lying on my back facing upward.

Q. Officer Belcher, you can put the pointer down and if you would continue standing where you are, I will hand you what has been admitted into evidence as Joint Exhibit 66 and ask you if you can identify that photograph? A. Yes, sir, I can.

Q. Is that a photograph of the area you have just described? A. Yes, sir, it is. [p. 658]

Q. Would you turn the photograph around so the jury can see it. Hold it on your chest and would you point out in the photograph, say with your lefthand, where approximately your head was, A. My head was directly in this position (indicating) behind this chair and shoved up against the wall.

Q. In the photograph you see broken glass on the front of the juke box. Do you know how that glass was broken? A. I cannot say how it was actually broken.

Q. Officer Belcher, I hand you what has been marked for purposes of identification and I believe admitted as Joint Exhibit 67 and I would ask you if you can identify that photograph? A. Yes, sir, I can.

Q. Would you tell me what that photograph describes; turn it to the jury. Can you point out what that photograph describes? A. This is a similar scene only taken from a further distance, probably 20 feet further away than the original photograph.

Q. Is that a fair and accurate representation of Jimmie's Cafe on the morning of March 1, the morning in question? A. Yes, sir, it is.

Q. Officer Belcher, I hand you what has been admitted as Joint Exhibit 65. I will ask you if you can identify that? A. Yes, I can. [p. 659]

Q. Would you turn it towards the jury and describe what it is. A. This is a picture of the interior of the bar. The picture would be taken approximately 35 or 40 feet from the front door. The picture would be taken in a westerly direction.

Q. Would you, while you are holding that in your hand, just reach over with your finger and show approximately where the photographer would have been standing and which way he would have been looking. A. From the picture taken here, the photographer would have to be facing directly west towards Summit

Street, towards the front entrance of the bar, and it is apparent that he was standing at the end of the first section of the bar.

Q. Officer Belcher. you previously had testified that Mr. Kyle Morgan was lying on the ground and was being stomped by I believe Mr. Noe and that he was holding onto something on the booth. Can you point out in the photograph approximately where Mr. Morgan was lying and approximately what, if you know, Mr. Noe was holding onto at the time he was stomping him? A. Kyle Morgan was lying directly at this location at the end of the piano (indicating.) Michael Noe was either holding onto this coat rack on the end of this first booth from the piano or onto the end of the booth itself.

Mr. Morgan was lying on the floor directly beneath [p. 660] him and was being stomped at that point.

Q. From your observation what did it appear or why did it appear that Mr. — Never mind. Strike that.

I hand you what has been marked for purposes of identification as Joint Exhibit 64, which I believe has been admitted. I would ask you if you can identify that. A. Yes, sir, I can.

Q. Would you turn it towards the jury and describe what it portrays. A. This is a picture taken of the south wall of Jimmie's Cafe. It shows the cafe tables that I was referring to. It shows the very first bar stool as you walk in the door. It would be on your right-hand side. It shows the telephone on the south wall of the bar.

Q. Approximately where would the photographer have been standing on the diagram in order to take that picture, if you would point to it. A. The photographer?

Q. Point to where the photographer would be stand-

ing and which way he would be looking. A. To get this picture, the photographer would have to be standing somewhere about the front door.

Q. And looking back which way? A. He would be looking in a southeasterly direction.

Q. Do each of these four photographs accurately portray [p. 661] the scene in Jimmie's Bar that evening, to the best of your recollection? A. Yes, sir.

Q. You may return to your seat.

Officer Belcher, as you were laying on the floor after you had come to after you had recovered your weapon, as you removed the weapon from behind your back and pointed it upward —

Mr. Taylor: I object to the form even at this stage.

The Court: Your objection is premature.

Q. — what thought was in your mind?

The Court: Just a minute. Do you object to this question?

Mr. Taylor: Yes, sir.

The Court: Come up.

(Thereupon followed a discussion off the record.)

The Court: The objection is overruled. You may answer that question. A. I am sorry. Sir, would you repeat the question?

The Court: Have the reporter read it back.

(Thereupon said question was read back.) A. The thought in my mind at that point was that I was going to be killed on that barroom floor if I did not use the weapon I had, I would be killed. [p. 662]

Mr. Hughes: No further questions, Your Honor.

The Court: You may cross-examine.

Cross-Examination

By Mr. Taylor:

Q. On the evening of the 28th of February, what had you done? Let me start over.

You are married; isn't that correct? A. That's correct, sir.

Q. Is your wife employed? A. Yes, sir, she is.

Q. What did you do about 11:00 o'clock that evening? A. I drove my wife to her place of employment at Western Electric. It is on 5600 East Broad Street.

Q. Then you returned home? A. Yes, sir, I did.

Q. When you returned home — Do you have children? A. Yes, sir, I do.

Q. What were their ages? A. My oldest boy I believe was 14 years old; had a daughter 12, and I had another son about 10½ years old or 11.

Q. Put them to bed? A. No, sir, I did not.

Q. Is that when you called Bonnie? A. I don't recall. [p. 663]

Q. Anyway, you did call Bonnie? A. I don't recall.

Q. There is no question in your mind now that Bonnie Lohmann was your girlfriend at that time; isn't that correct A. I have not denied that.

Q. Did you give testimony as to what your relationship was in the Common Pleas trial? A. I don't recall.

Q. Do you remember having said you was a social friend and a friend of the family and bestman at the wedding of Bonnie's mother? A. I recall that.

Q. Do you recollect how much you had to drink? A. On what date, sir?

Q. After you arrived at Jimmie's Cafe. A. Yes, sir, I recollect exactly.

Q. Is it your custom to order doubles or singles? A. I usually drink singles.

Q. Did you order a double that night? A. I don't recall.

Q. You haven't reread any of your prior testimony prior to giving your testimony here? A. Yes, I have read it.

Q. You don't remember anything being indicated in there as to the amount of alcohol you may have ordered. [p. 664] A. I know how much I consumed that night, sir.

Q. What did you order, a double, single? A. I don't recall how much was delivered. I believe I ordered a drink.

Q. I believe you stated that you placed yourself in a position in this booth so that you could observe proceedings to the east in the bar; isn't that correct? A. Yes, sir.

Q. I guess implicit within that answer is the recognition that if you had been facing the other direction, you would not be able to observe them; isn't that correct? A. That's true.

Q. I believe Bonnie Lohmann was sitting directly across from you facing you in that bar; isn't that correct? A. That's true.

Q. Could you explain to me how she could observe the incident, the booths are rather high in that place; aren't they?

Mr. Hughes: Your Honor, I would object to the form of the question. He is asking this witness how Bonnie Lohmann observed something. I don't think that's within his knowledge.

The Court: I think the question is how could she in her position. You may answer. A. Yes, sir. She could observe everything in the bar merely by turning her body or her head or her eyes in the [p. 665] direction that she wished to see something.

Q. (By Mr. Taylor) She could sit — She was on the inside of this booth; isn't that correct? A. I believe so.

Q. Turn her head and see somebody stomping somebody down by the piano. A. Yes, she could, I believe.

Q. There is no doubt in your mind that that's where this altercation was taking place between Kyle Morgan and Mr. Noe; isn't that correct? A. Yes, sir.

Q. There never came a point in time when it moved down to where they were fighting at your feet; isn't that correct? A. I don't believe it got that close to us, no, sir.

Q. If mace works correctly, it will spray a distance of 25 to 30 feet; isn't that correct? A. I don't believe the mace that we were issued at that time would reach that far.

Q. Do you remember inquiry having been made of you by the prosecutor in the other trial as to the distance that mace would or would not travel? A. By the prosecutor in which trial, sir?

Q. Mr. Sallenby, Common Pleas Court. A. I don't recall the testimony made there.

Q. From the booth where you were sitting, how far in [p. 666] feet was it to the piano where this dispute was taking place? A. It would be, judging by the width of the booth and the space between the piano, I would say nine feet.

Q. I believe you testified now that there is no question but when you got up from that booth, you was going outside to make a phone call. A. My intent was to leave that bar by the front door to go directly to the phone booth outside and call the police.

Q. It is your testimony to the ladies and gentlemen of this jury you did not intend to spray Michael Noe with any mace at that time? A. That's correct.

Q. You did not intend to arrest him at that time? A. No, I did not, sir.

Q. I ask you if you will remember the testimony you gave at the preliminary hearing before Judge Golden on this affidavit as it related to your intentions at the time you got up from the booth? A. I don't recall.

Q. I will read this question and answer and ask you if you agree with having made that statement at that time:

"The Prosecutor: Go ahead, sir. A. At this part, Mrs. Compston got up since she is the regular barmaid there, the person managing. She got up, stepped over to Noe, where all the scuffle was going on. [p. 667] Noe shoved her, kept on kicking these people that he had on the floor."

Do you remember having given that testimony at that earlier time? A. I have given that testimony at some time. I can't recall where.

Q. You observed Noe shove Mrs. Compston? A. Yes, sir, I did.

Q. So, Mrs. Compston was incorrect when she told us yesterday that she had never been touched or shoved or was not involved in the altercation? A. Yes, Mrs. Compston was incorrect.

Q. "At that time I stood up and attempted to spray Michael Noe with a can of mace that I had."

Do you remember that answer? A. No, sir. I believe that I said that with the intent to use the mace.

Q. "The tear gas didn't seem to work very much. Instead of coming out in a liquid stream, it came out in a dust and just generally sprayed everybody there."

Do you remember that response to that question at that time? A. Yes, sir.

Q. "That is all the action I got into. All I wanted to do was stop the fight at that point." [p. 668] A. That's correct. That was my intention.

Q. That is the point in time when the mace went over everybody in the bar; isn't that correct? A. I assume.

Q. At that point in time you had not identified yourself as a police officer; had you? A. No, sir.

Q. Did you at any time identify yourself as a police officer? A. No, sir, I did not.

Q. Do you remember in the trial at Common Pleas where I asked you with regards to your intent when you got out of the booth? A. Sir, I don't recall exactly what testimony I gave in Common Pleas Court.

Q. Let me direct your attention to Page 318 of that transcript:

"At that time I read you this same statement:

"At that time I stood up, attempted to spray Michael Noe with chemical mace that I had. The tear gas didn't seem to work very much. Instead of coming out in a liquid stream, it came out in a gas and just generally sprayed everybody there. That is all the actions I got into. All I wanted to do was stop the fight at that point."

Then I asked you: Do you remember making that statement at the preliminary hearing? [p. 669]

Your answer was:

"Well, that was my intent."

"Q. That was your intent, to stop the fight with Noe?"

"A. Correct."

"And when you got out, up out of the booth, you turned to Noe to spray the mace?"

"A. Correct."

"And the mace malfunctioned; isn't that correct?"

"A. Yes."

Do you remember that series of questions and an-

swers at the point we discussed this matter at that second trial? A. That is basically a correct statement.

Q. That is a correct statement? A. It is basically correct.

Q. Do you remember when you told Captain Smith the morning of March 1st when you were taken to police headquarters, do you remember what you told him as to the first time that you withdrew the mace? A. No, sir, I do not.

Q. I am examining off Exhibit 25 and we are on the second page. I will ask if you remember — You do remember a statement being made at that time? A. Yes.

Q. You do remember a stenographer being in there? A. Yes, I do. [p. 670]

Q. "I got this tear gas out of my pocket, sprayed it straight up in the air as these guys were stomping me. It didn't work and it didn't do any good with them."

Do you remember having told Captain Smith and Captain Borne that the first time you got it out of your pocket was when you were on the floor at that earlier time?

Mr. Hughes: Objection, Your Honor. That statement does not say that the first time I got that out of my pocket was on the floor.

The Court: Do you remember making the statement? A. No, sir, I don't.

The Court: Set the record straight. I will overrule your objection.

Q. (By Mr. Taylor) I believe you told the ladies and gentlemen of this jury a few minutes ago that Noe went out the door and you chased him and you caught him. Was that the essence of your testimony? A. That was my intention, sir, to catch that man.

The Court: What was your testimony? A. I did; that is correct, yes, sir.

Q. (By Mr. Taylor) You did testify that you went out and then you caught up with him; right? A. Yes, sir.

Q. I believe it has been your testimony that you even think this man was shot at the time that he was running; isn't [p. 671] that correct? A. I don't recall making that statement.

Q. Was it your testimony that you think that the bullet that you fired outside didn't hit Mr. Noe? A. Would you repeat that question?

Q. Do you have an opinion as to what bullet is supposed to be the one that mortally wounded Mr. Noe? A. Yes, I do.

Q. What bullet was that? A. That was the shot fired at him inside the place.

Q. So, it was implicit within your testimony that this man had a wound at the time you were chasing him; isn't that correct? A. No, that is not correct.

Q. But there is no question that it is a distance of 14 feet from the front of that bar to the curb; isn't that correct? A. I have never measured it. I would assume it is a correct statement.

Q. You caught him at some point before he got to the curb? A. Yes, sir.

Q. You did run out and you did catch him? A. Yes, I did catch him.

Q. Do you remember the testimony that you gave to [p. 672] Captain Smith and Captain Taylor at that morning as it regards what happened to you when you went outside this door? A. I can't recall exactly.

Q. Again, going to Page 2:

"When I stepped out the front door, this guy jumped me. We wrestled, struggled around on the sidewalk

in front of the bar. I don't know where that went; the man had my arm. I had the gun in my hand. I managed to knock him to the sidewalk."

Mr. Belcher, do you remember that testimony? A. Basically.

Q. Did the man jump you or did you chase this man which had a wound in him out and catch up with him? A. I believe that the man was attempting to escape from me. I grabbed his shirt from the back and that's when this trouble began.

Q. How's come you told Captain Smith he jumped me? A. I was merely holding him, sir, and he immediately began to resist or fight me, so in essence he jumped me.

Q. Mr. Belcher, it is my understanding from your testimony a few moments ago that the geographical location on the diagram where the altercation was taking place was over this table and around this table, near the juke box and at the extreme west end of the bar; isn't that correct? A. That's true. [p. 673]

Q. I believe your testimony was to the effect that you were in a position that your feet was up over one of these tables, that it had been shoved up against the wall, and you were in an impossible position at that location; isn't that correct? A. That's correct.

Q. I believe your testimony was that when you discharged this firearm the two bodies fell on you; isn't that correct? A. Yes.

Q. Is that diagram a true and adequate representation as to where these bodies were immediately after the incident? A. Approximately.

Q. Mr. Stengel was — Did they move after you shoved them off of you and you went after Noe? Did they move from the table over here where you were

in this impossible position? A. Do you mean did they move around on their own power or anything like that?

Q. Yes. A. Very little.

Q. Were these bodies in a different position when you came back outside from having the incident from Noe than they were when this altercation was taking place over here at the table? A. I believe that Casey Stengel may have been able to move himself a little bit, but I don't think Bob Ruff was able to.

Q. So we understand your testimony in this trial, it is our understanding that — it is my understanding — and I want to be correct on it — that somewhere in this altercation the weapon or firearms became disengaged from your body; is that the essence of your testimony? A. That's correct.

Q. I believe you told the jury that you were scared that one of these men who were attacking you would see this weapon and kill you with your own weapon; isn't that correct? A. That's correct.

Q. Because it was laying on the floor somewhere and then almost intuitively it was under your back and you found it just before you was going to pass out? A. I was searching for the weapon, sir.

Q. In your search — as a matter of fact — didn't you find that weapon in your waistband? A. No, sir, I did not.

Q. Let me ask you again if you remember a statement that you gave to Captain Taylor, Captain Borne and Captain Smith, page 2:

"Got this tear gas out of my pocket, sprayed it straight up in the air as these guys were stomping me. It didn't work. It didn't do any good with them. I couldn't get [p. 675] them off me.

Finally, just before I felt I was going to pass out, I rolled over on my stomach on the floor, pulled this pistol from my waistband, my pants, and was dragged by the hair of my head."

Did you pull the pistol from your waistband or did you find it under your back? A. At the time I made that statement, sir, I would assume that — I would admit that I did tell Mr. Smith, Captain Smith, that statement.

Q. The thing I am concerned about now is which one is the truth. A. At the moment I made that statement, sir, I was still confused. I was being questioned within a short time after the incident. I since then had much time to think about the incident and I know now that I found the gun on the floor beneath my hips.

Q. Did you ever go to any of your superior officers and tell them that you had given them an incorrect statement? A. No, sir.

Q. Still didn't identify yourself as a police officer? A. No, sir, I did not have time to.

Q. You was chasing Noe outside. Did you yell halt? A. No, sir.

Q. Did you fire a warning shot into the air? [p. 676] A. No sir, I did not fire warning shots.

Q. You were in the National Guard, weren't you, Officer Belcher? A. Yes, sir, I was.

Q. Participate in athletics? A. Yes, sir, I have.

Q. Amateur boxer? A. Yes, sir.

Q. No doubt in your mind and you observed that Agnes Morgan started that dispute; didn't she? A. I did not make that statement, sir.

Q. No. There is no dispute that you observed it and the original aggressor in that dispute was Agnes Morgan back there; isn't that correct? A. I could not

make that statement, but I do not know what started the argument or what the argument was about.

Mr. Taylor: Let me confer one moment.

(Thereupon followed a discussion at plaintiffs counsel table.)

Mr. Taylor: That concludes my examination, Your Honor.

The Court: Do you have any other questions?

Mr. Hughes: Yes, Your Honor, if I might. [p. 677]

Redirect Examination

By Mr. Hughes:

Q. Officer Belcher, please step to the drawing. Pick up the pointer. I believe you have previously testified and pointed out on the photograph the either coat hanger or side of the booth that Mr. Noe was hanging on as he was stomping Mr. Morgan. Can you point that out on the drawing? A. It was on the corner of the first booth to the west of the piano.

Q. Where was Mr. Morgan lying? A. Mr. Morgan was lying in this location directly south of the booth, of the first booth.

Q. How big approximately is Mr. Morgan? A. I couldn't estimate his size at the time.

Q. Let's assume that he is five foot, six - approximately how big is one of those booths?

The Court: Will you come up, please, gentlemen.

(Thereupon followed a discussion off the record.)

Q. (By Mr. Hughes) So, Mr. Morgan was laying somewhere immediately south of that booth; is that correct? A. Yes, sir, I believe that rather than lying he was more in a sitting position attempting to support himself.

Q. Where was Bonnie Lohmann at this time? A.

Miss Lohmann was in the center of the three booths, I believe against the north side of the wall or the center of [p. 678] the booth, seat.

Q. How big is one of those booths approximately, as best you can estimate it? A. Approximately six feet.

Q. Approximately how far was Miss Lohmann from Kyle Morgan while he was being stomped? A. It would be merely the width of one of the booths.

Q. Again point out approximately where your head was at the time that you fired the shots. A. Sir, at the time that weapon discharged my head was in the corner, in the space between the juke box and the wall to the southwest corner of the bar.

Q. Which way was your body laying? Where approximately would your feet have been then? A. My feet would have been in a northeasterly direction, probably in a 45-degree position from the corner of that bar.

Q. Assuming that this drawing is accurate, would your feet then approximately have been, if you were laying straight out, at about the same position as the feet of Messrs. Ruff. and Stengel? A. Referring to the drawing, my feet would be approximately in this area (indicating.)

Q. I believe your testimony was that you slid out of the bar. Point out exactly — pardon me, out of the booth — where you were when you slid out of the booth. [p. 679] A. I was seated in this booth, the center booth, on the west side of the booth at this point. I was seated towards the outside of the booth, this aisleway.

Q. How far out of the booth had you gotten at the time you were jumped? A. I was still touching the booth, sir.

Q. Had you removed the tear gas from your pocket prior to the time you were jumped? A. Yes, just prior.

Q. In point of time as you were sliding out of the booth, did you fire the tear gas before you were jumped or vice versa? A. I could not truly and honestly say.

Q. Did you fire the tear gas at any time while you were still up before you had fallen to the ground? A. Yes, sir, I did.

Q. Did you fire the tear gas or continue firing the tear gas after you were on the ground? A. I did.

The Court: Come up here, gentlemen.

(Thereupon followed a discussion off the record.)

Q. (By Mr. Hughes) Officer Belcher, after you fired the weapon, I believe your testimony is — Pardon me, You can return to the stand and we can take the drawing away — After you fired the shots, I believe it is your testimony that one of the gentlemen fell on top of you and you had to shove [p. 680] him off to get up; is that correct? A. Yes, sir.

Q. Do you know now whether that was Mr. Stengel or Mr. Ruff or who it was? A. Yes, I know now.

Q. Who was that? A. That was Bob Ruff.

Q. On the drawing — I moved it too soon — but we don't have to get it back out — is he the body closer to the door? A. Yes, sir.

Q. Then you got up off the floor? A. Yes.

Q. How many shots had you fired at that time? A. Three shots, sir.

Q. How far ahead of you, as best you could estimate it, was Michael Noe at the time you both went out the door? A. I don't believe that Mike Noe was any further than two large strides.

Q. I believe that you testified on cross-examination that you believed that Mr. Noe, the fatal shot into

Mr. Noe, was fired inside the bar; is that your opinion? A. Yes, it is.

Q. However, as you went out the door or at any time prior to the time when I think you testified that you hit him with your revolver — pardon me — with your automatic, did you [p. 681] notice or observe that he was wounded or that there was any blood on his shirt? A. I am going to have to ask you to repeat that, sir.

Q. When did you first notice any blood on his shirt?

The Court: I don't think it's been established that there was any blood on his shirt. I think you better withdraw that question and put it in a different form.

Mr. Hughes: Thank you, Your Honor.

Q. When did you first observe blood, if you did? A. I first observed blood on Mike Noe's white shirt front just before he fell to the sidewalk in front of the bar.

Q. Was that before or after you had hit him and the gun had gone off outside? A. It was after I had struck him with the pistol.

Q. Physically where were you and Mr. Noe located at the time you first — pardon me — at the time that you hit him with your pistol? A. Mike Noe and I were grappling with each other directly in front of the bar to the south of the entrance to the bar. Mike's back was roughly or approximately in front of the window of the bar. He would be facing westward towards Summit Street and I was facing eastward.

We were within a foot or two of the plate glass window.

Q. Then how did he get from that position to the position that is shown on the sidewalk as approximately, I would guess [p. 682] in feet, about seven feet

from the entrance and his head, about 14 feet? A. I was holding on to Mike's arms. I believe he made a couple of steps and as he started to fall to the floor, or to the sidewalk, or as he collapsed, I held onto him until he laid on the sidewalk.

Q. In your statement to the firearms review board, which I think was alluded to by counsel in his cross-examination of you, you used the word jump. Could you explain what you meant by the use of that word outside? A. Yes, sir. As I caught up with Mike, I grabbed his shirt and he wheeled around and made an effort to lunge toward me.

Q. Was there a continued altercation outside? A. Yes.

Mr. Hughes: No further questions, Your Honor.

The Court: Do you have any other questions, Mr. Taylor?

Mr. Taylor: No, sir.

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Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

ORAL MOTION FOR DIRECTED VERDICT
ON BEHALF OF RAYMOND BELCHER
AT END OF PLAINTIFFS' CASE IN CHIEF

[p. 547]

* * * * * * * * *

The Court: I will hear from you, Mr. Hughes.

Mr. Hughes: Your Honor, at this time I would ask for a dismissal of the complaint against Officer Belcher as to Claims 1, 3 and 6.

The Court: One, 3 and 6 or 1, 3 and 5?

Mr. Hughes: One, 3 and 5.

I do so, Your Honor, based upon the evidence as I understand it at the present time, and to do so I will briefly take the position that there is no evidence in the record at this time to show that in any way Officer Belcher, through his actions in the bar that night, in any way deprived Casey Stengel of any of his civil rights.

The civil right that would seem to me —

The Court: Casey Stengel or the two decedants?

Mr. Hughes: Or the two decedants. [p. 548]

As I would understand, the gravamen of this complaint is basically a tort was committed without provocation upon each of the three plaintiffs by Officer Belcher at the time —

The Court: Isn't the gravamen of the offense, Mr. Hughes, that Officer Belcher as an off duty policeman had the right and even the duty to carry out a normal police function when he knew that there was a fight going on in Jimmie's Cafe among the patrons in that cafe?

Is there any question in this case, under this record so far, that Officer Raymond Belcher was acting under color of law?

Mr. Hughes: Your Honor, it is my position that he was acting in line of duty under color of law as a policeman of the City of Columbus.

The Court: That being established, isn't the real nitty-gritty gravamen here whether or not it was necessary under all the facts and circumstances for Belcher to resort to shooting either — to carry out his police function or to protect himself?

Mr. Hughes: That's precisely it, Your Honor, and I in fact would make my argument based primarily on the latter rather than the former.

It is our belief first and foremost that Officer Raymond Belcher at that time was defending himself when he considered himself to be in grave, serious danger of great [p. 549] bodily harm and/or death as a result of what was being done to him.

It is only in the alternative, or in addition thereto, that we would argue that the force was used pursuant to the actions of a police officer who was a witness to a crime going on in his presence and was acting as a police officer.

I would put more reliance on the fact that he was in jeopardy and he fired based on the evidence in the record in order to defend himself.

If I might briefly summarize the evidence, the evi-

dence from the only eyewitness that has testified as of this time in this case is the evidence that Casey Stengel has given to us.

We will attack that if we have to put on a defense, but taking his statement in the light most favorable to him, as I think the Court has to do for purposes of this motion, he states that he did not kick Officer Belcher; that he did not see anyone else kick Officer Belcher.

The last thing he remembers concerning Officer Belcher was that Officer Belcher was on the ground; that Robert Ruff was standing over Officer Belcher, and that he turned his back to go back to wherever the other fracas was going on, and that he was then shot.

His testimony is that he doesn't even know who shot him. The only way that it can be shown in this record as of [p. 550] this time who fired the shot is by the admissions which have come in as hearsay without objections through the various documents, reports, statements and testimony of the various police officers that did interview Officer Belcher.

Officer Belcher admitted, and there is no question about this, that he did do the shooting. If we are going to take that admission, we have to take that admission as a whole and contained within that admission is the justification of self-defense.

"I was on the ground, etc. Three people jumped me and I had to shoot them."

There are numerous statements of that effect in the record. There is absolutely no conspiracy evidence in the record as to the claim of self defense. The burden of proof is on the plaintiffs to go forward.

At the present time there is absolutely nothing in

this record. It is totally devoid, totally devoid of any possible contradiction of the statement of Officer Belcher which has come in through direct testimony of witnesses called by the plaintiffs as an admission.

Now, the explanation of the shooting is on par with and equal to the admission of the shooting. Therefore, the state of the evidence, as I see it right now, is that there is an uncontradicted explanation of justifiable homocide under the circumstances as to each of the three persons involved. [p. 551]

The Court: Mr. Stengel is still living, so we only have two homocides.

Mr. Hughes: I withdraw that remark.

As to each of the three persons, there is an absolute excuse in the law of the State of Ohio for their having been shot and there is no contradictory evidence, nothing whatsoever, and to allow the case to go forward is simply to allow the jury to speculate as to what may have happened outside the record.

For that reason, Your Honor, we believe that we are entitled, as to each of the claims concerning the two decedants and as to the claim of Casey Stengel against Officer Belcher, to a directed verdict at this time.

The Court: Thank you, Mr. Hughes.

You may proceed, Mr. Lewis.

Mr. Lewis: If it please the Court:

First I would like to address myself to the technical part of Mr. Crawford's motion regarding the evidence about the appointment of the two administrators which I believe the Court had some concern about, was passed over.

I believe the state of the situation is that we have alleged in our complaint the existence of their ap-

pointment of these administrators. It has been denied generally in the complaint or in the responses thereto.

Thereafter the Court put on a pretrial order that was [p. 552] joined by both parties that listed the controverted issues and the uncontroverted issues.

It is my recollection that that is not in the controverted issues in any way, shape or form from the pleadings.

In addition to this, I believe that Rule 9 (b), I believe it is of the Rules of Civil Procedure, Federal Rules of Civil Procedure, requires that there be some specific — if they want to contest the allegations of the complaint, this must be done specifically in a pleading, and I think that those two points basically dispose of that technical issue.

Now, regarding some of what I feel are the larger issues that I have heard discussed here, I think it is difficult with this number of exhibits — I know the Court has followed this closely, and is quite familiar with a lot of details of the evidence — but for instance things that the Court seemed interested in was there anything in the record about Raymond Belcher drinking hard liquor at the time?

There is in the exhibits and reports and this type of thing that I think are all now in evidence, and I don't think on a motion to dismiss the case at this stage, that it can be — there is a mass of evidence there in these exhibits that's interrelated to all the oral testimony.

The only thing that we have introduced thus far is tied into the oral testimony. I frankly, in view of those exhibits, fail to follow some of the arguments that there isn't [p. 553] any proof of death here.

There is the presence of the people there. There is the shooting. There is the bullets, and I don't believe that the overall picture of all this evidence, that I need to address myself to that argument as I follow it.

I think the Court has properly stated what is necessary to tie in the conspiracy, the overt acts, and I think if there is anything that I could attempt to address myself to, that I would attempt to do so, but this is all the response that I want to make at this time.

The Court: Mr. Lewis, I believe that Mr. Crawford said in respect of Count 1 in which Mr. Dwight Joseph is a defendant along with Raymond Belcher, I think Mr. Crawford said that the doctrine of responding to superiors doesn't apply in that cause of action.

Let us assume even that Belcher had one or two drinks at Jimmie's Cafe that night, and let us assume even that the partaking of one or two drinks to some extent at all interfered with his judgment and his control.

Is a chief of police the insurer of the conduct of every off duty patrolman who under the regulations is required to wear a firearm?

Mr. Lewis: No.

The Court: And how are you going to hold Dwight Joseph responsible under the record as you have made it so far? [p. 554]

Mr. Lewis: If the Court will recall that I questioned Mr. Joseph about the regulations. There is evidence in the record.

The Court: You don't contend that there is anything illegal about this regulation? You don't contend it is unconstitutional; do you?

Mr. Lewis: No, we haven't contended that.

The Court: You may question the wisdom of the regulation but facially it's legal and constitutional; isn't it?

Mr. Lewis: If the Court please, Mr. Taylor, that particular phase that the Court is making inquiry about, he has done some research on.

The Court: I want to know what evidence is there in the record that you can make Dwight Joseph responsible for Belcher involving himself, whether justified or not, in the fight that was going on in Jimmie's Cafe that night.

Mr. Lewis: Well, it is in the record that Dwight Joseph, through these regulations, the regulations are in evidence, he has some leeway by the language how they may be enforced, and it is in that area that we think there can be some responsibility.

The Court: Mr. Lewis, let's suppose that there was absolutely no evidence in the record whatsoever that Raymond Belcher had any kind of liquor or beer, and under the same [p. 555] circumstances exactly, would you be able to pull Dwight Joseph into this claim.

Mr. Lewis: I think if the evidence would show that, it would weaken the situation a little bit, but the gravamen of the complaint—

The Court: That being the case, would that make the chief of police almost the guarantor of the conduct of every off duty policeman?

Mr. Lewis: No, I don't think that is possible. It is only where we have a regulation the chief has drawn that requires—

The Court: Let's suppose he didn't draw it. The fact that he did draw that, if it is in accordance with his constituted authority, it doesn't make any difference whether he drew it or his predecessor drew it.

Did the fact that he drew that make him, let's say, the insurer of the conduct?

Mr. Lewis: No, but the regulation—and Dwight Joseph testified on his testimony—that under that regulation it was so strict that he would have been disciplined if he had not been carrying that weapon at that time and place and the circumstances.

It is in that area that we feel that the tie in the first cause of action comes.

The Court: Does that complete your argument? [p. 556]

Mr. Lewis: Yes.

The Court: The motions are submitted.

The Court will recess for approximately 15 minutes, at which time he will announce his decisions on the motions.

The clerk will please recess the Court.

(Recess taken.)

The Court: The record will show that the Court has considered the motions of all defendants for a directed verdict under the provisions of Rule 50, Federal Rules of Civil Procedure, made at the close of the plaintiffs evidence in respect of Claims 1 through 6 inclusive as set forth in the amended complaint; the arguments in support of said motions and the arguments contrary thereto.

The Court first disposes of the motions in respect of Claims 1, 3 and 5.

Upon full consideration of all the evidence presented by plaintiffs in proof of such claims and being fully advised in the premises, the Court finds and decides in respect to the defendant Raymond Belcher that reasonable minds could arrive at different conclusions, and therefore the motion for a directed verdict in favor of the defendant Raymond Belcher is denied as to Claims 1, 3 and 5.

In respect to the defendant Dwight Joseph, and upon the same consideration of the evidence, and being fully advised in the premises, the Court finds and decides that reasonable [p. 557] minds would not arrive at a different conclusion on the evidence in the record, and therefore the motion for a directed verdict in favor

of the defendant Dwight Joseph is granted as to Claims 1, 3 and 5, and the defendant Dwight Joseph is hereby dismissed as a defendant in Claims 1, 3 and 5.

The Court next disposes of the motions for a directed verdict as to all defendants named in Claims 2, 4 and 6.

Upon full consideration of all the evidence presented by plaintiffs, in proof of the cause or causes of actions set forth in Claims 2, 4 and 6, the Court finds and decides that reasonable minds would not arrive at different conclusions on the evidence in the record and therefore the motions for a directed verdict in favor of all defendants is granted as to Claims 2, 4 and 6, and such named defendants being Raymond Belcher, Dwight Joseph, John Hawk, Francis B. Smith, Robert Taylor, Richard Borne, Earl Belcher, James J. Hughes, Sergeant P. Hopkins, E. Young, M. Hardin are hereby dismissed as defendants in this action.

Now, the defendants who have been dismissed — and they are all defendants in Caims 2, 4 and 6 — will now please leave the courtroom. Of course, the defendant Raymond Belcher will remain, and upon your leaving the United States Marshal will return the jury to the courtroom

* * * * * * * *

Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division

(Title omitted in printing)

PORTION OF CHARGE TO JURY OF DISTRICT COURT

[p. 761]

* * * * * * * * *

In this case the Plaintiffs claim damages for personal injuries alleged to have been suffered or sustained by them as a proximate result of deprivation under color of some State law or municipal regulation of rights and privileges and immunities secured to the Plaintiffs both by the constitution of the United States and by an act of Congress providing for equal rights of all persons within the jurisdiction of the United States.

Specifically, the Plaintiffs make three claims as [p. 762] follows:

One; Plaintiff Stengel claims that the Defendant Raymond Belcher illegally used excessive force when Belcher shot Stengel on the morning of March 1, 1971 while acting under color of State law.

Two and three; the Plaintiffs Charles Ruff and Timothy Noe claim in behalf of the decedents Robert Ruff and Michael Noe respectively that the Defendant Raymond Belcher illegally used excessive force when Belcher shot the decedents on the morning of March 1, 1971 while acting under color of State law.

Section 1983 of Title 42, United States Code, provides that

"Any inhabitant of this Federal district may seek redress in this court by way of damages against any person or persons who, under color of any law, statute, ordinance, regulation or custom, knowingly subjects such inhabitant to the deprivation of any rights, privileges or immunities secured or protected by the constitution or laws of the United States."

The statute just outlined to you comprise one of the civil rights enacted by the Congress under the 14th Amendment to the Constitution of The United States.

The 14th Amendment to the Constitution provides that

"No state shall make or enforce any law which shall [p. 763] abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

In order to prove his claim, the burden of proof is upon the Plaintiff Stengel to establish by a preponderance of the evidence the following facts:

First; that the Defendant Belcher used excessive force by shooting Plaintiff Stengel on or about March 1, 1971 at approximately 1:30 A.M.;

Second; that the Defendant Belcher then and there acted under color of some state or local law;

Third: that the acts and conduct of the Defendant Belcher which Plaintiff Stengel complains of were knowingly done in such way and manner or under such circumstances as to deprive Stengel of his Federal Constitutional right not to be denied or deprived of his life or liberty without due process of law;

Fourth: That the Defendant Belcher's acts and conduct so done were the proximate cause of injury and consequent damage to Plaintiff Stengel.

In order to prove their claims, the burden of proof is upon Plaintiffs Charles Ruff and Timothy Noe as administrators of the estates of Robert Ruff and Michael [p. 764] Noe to establish, by a preponderance of the evidence the following facts:

First: That Defendant Belcher used excessive force by shooting decedents Robert Ruff and Michael Noe on or about March 1, 1971 at approximately 1:30 A.M., wrongfully killing them.

Second: That the Defendant Belcher then and there acted under color of some state or local law;

Third: That the acts and conducts of the Defendant Belcher, of which the Plaintiffs complain, were knowingly done in such a way or manner or under such circumstances as to deprive decedents Robert Ruff and Michael Noe of their Federal Constitutional rights not to be denied or deprived of their life without the due process of law;

Fourth: That the Defendant Belcher's acts and conduct so done were the proximate cause of the injury and consequent damage to the decedents Ruff and Noe.

Acts are done under color of law of a state not only when state officials act within the bounds or limits of their lawful authority, but also when such officers act without and beyond the bounds of their lawful authority.

In order for unlawful acts of an official to be done under color of any law, however, the unlawful acts must be done while the official is purporting or pretending to act in the performance of his official duties. That is to [p. 765] say, the unlawful acts must consist in an abuse or misuse of power which is possessed by the official only because he is an official, and the unlawful acts must be of such a nature and be committed

under such circumstances that they would not have occurred but for the fact that the person committing them was an official purporting to exercise his official powers.

As you will note, the Federal statute which the Defendant is alleged to have violated covers not only acts done by an official under color of any state law but also acts done by an official under color of any ordinance or regulation of a municipality of a state, as well as acts done by an official under color of any regulation issued by a municipal official.

The manner in which Defendant Belcher may have acted under color of state law was that he carried a gun, a side arm, while off duty. The reason he carried a weapon is because of a police regulation issued by the Chief of Police of the Columbus Police Department which reads in part as follows:

"Members of the Division of Police while off duty shall carry the weapon and ammunition issued to them:

One: Carrying a personal weapon off duty. Members of the Division of Police desiring to carry a personal handgun instead of their issued revolver, shall request [p. 766] permission through the Police Range Officer."

An act is done knowingly if done voluntarily and intentionally and not because of some mistake or accident or some other innocent reason.

The 14th Amendment to the Federal Constitution provides that no state shall deprive any person of his life or liberty without due process of law.

The liberty of the individual which the Federal Constitution thus secures and protects is not an absolute and unqualified freedom or privilege to do as one pleases at all times and under all circumstances, but

it is always subject to reasonable restraints, including of course such restraints as are imposed by law.

Plaintiff Stengel and Decedents Robert Ruff and Michael Noe, in common with the defendant and all other persons living under the protection of our constitution, had the legal right at all times not to be deprived without due process of law of life or any liberty secured or protected to them by the constitution or laws of the United States.

Stengel, Ruff and Noe had the liberty to be free from unlawful attacks by the use of excessive force upon the physical integrity of their persons.

It has always been the policy of the law to protect from unauthorized violation or interference the physical [p. 767] integrity of every person, so Stengel, Ruff and Noe had the right under their Federal Constitution not to be deprived of this liberty involving the physical integrity of their persons without due process of law.

To be deprived of life or liberty without due process of law means to be deprived of life or liberty without authority of the law.

Before the jury can determine, then, whether or not the Plaintiffs were deprived by the Defendant of any of their life or liberty under the Federal Constitution, without due process of law, the jury must first determine, from a preponderance of the evidence in the case, whether the Defendant Raymond Belcher knowingly did the acts alleged; and, if so, whether, under the circumstances shown by the evidence in the case, the Defendant Raymond Belcher acted within or without the bounds of his lawful authority under state law.

For if the Defendant Raymond Belcher acted within the limits of his lawful authority under state law, then

the Defendant could not have deprived Plaintiff Stengel or the Decedents Robert Ruff or Michael Noe of any life or liberty, without due process of law, since the Court finds and instructs you that the state law applicable in this case, that is, a Columbus policeman is required to carry his weapon while off duty, [p. 768] meets the due process of law requirements of the Federal Constitution.

The mere fact that the evidence in the case may establish physical contact between Defendant Raymond Belcher and the Plaintiff Stengel and the Decedents Robert Ruff and Michael Noe which resulted in serious physical personal injury to Stengel, and in death for Ruff and Noe, is not proof that the Defendant acted beyond his lawful authority under state law.

A police officer, even though off duty, has the lawful authority to intervene in a breach of the law, a breach of the peace, to restore order, to protect innocent bystanders, to protect property and to arrest law violators;

However, he may not use excessive force. Such use would be without lawful authority.

A police officer has the lawful authority to use such force as is necessary to effect an arrest. He may also use sufficient force to subdue a law violator. He may not use more force than is necessary to make an arrest and protect himself from injury.

It is the general rule that a police officer may not use deadly force to make an arrest.

Use of a gun would be use of excessive force unless he discharges his firearm in self defense when he has reasonable cause to believe that he is in danger of his [p. 769] life or safety.

The law does not measure nicely the degree of force which may be used to repel an attack. A police officer who is assaulted may use such force as is necessary under the circumstances to protect himself and to subdue his attacker. He may not shoot his attacker unless he has reasonable cause to believe that he is in danger of his life or great bodily harm.

The fact that a person or persons have assaulted a police officer who is acting in the performance of his lawful duties does not alone justify th use of deadly force by the police officer.

Rather, the police officer may use deadly force only if he has a reasonable fear of death or great bodily harm.

An assault is the use of physical threat or menacing acts toward another with intent to cause personal injury. An assault is an intent to injure coupled with a present ability to do bodily harm to another.

Touching the person of another is not a necessary element of an assault.

A battery is the actual touching or striking of the person of another with intent to inflict some personal injury, however slight.

To constitute self defense there must have been, on the part of the police officer, a careful use of his [p. 770] faculties and reasonable grounds to honestly believe that there was an immediate danger to his person or to his life. There must have been a sufficient act, coupled with an apparent present ability to carry it out, to cause the police officer to reasonably believe that the other party intended to kill or do him great bodily harm, and that the shooting was necessary to save himself from death or great bodily harm.

If the police officer has reasonable ground and an honest belief that he was in imminent danger of death or great bodily harm, and that the only means of escape from such danger was by injuring or killing his assailants, then he was justified even though he was mistaken as to the existence of such danger.

In determining whether the Defendant Belcher had reasonable grounds for an honest belief that he was in imminent danger, you must put yourselves in the position of this Defendant with his characteristics, his knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him at that time, you must consider the conduct of the Plaintiff Stengel and the Decedents Robert Ruff and Michael Noe, and determine if their acts and words caused the Defendant to reasonably and honestly believe that he was about to be killed or to receive great bodily harm. [p. 771]

If in the careful and proper use of his faculties, the Defendant honestly believed and had reasonable grounds to believe that an assailant was not able and did not intend to kill or do great bodily harm to the Defendant, then the Defendant having notice of his adversaries' position was released from the danger and the right to use force in self defense ended.

If thereafter the Defendant continues to fight, he becomes the aggressor and a subsequent injury to another is unlawful.

An injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence in a case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

The issues to be determined by the jury in this case are:

One: When the Defendant Raymond Belcher acted toward Plaintiff Casey Stengel and Decedents Robert Ruff and Michael Noe, did the Defendant act under color of state law or municipal regulation?

When I speak of the Defendant acting toward Plaintiff Casey Stengel and the Decedents Robert Ruff and Michael [p. 772] Noe, I am referring to allegations I have already outlined in the earlier instructions, Plaintiffs' claims and essential elements.

Specifically I am referring to the claim that Defendant Raymond Belcher used excessive force when he shot Plaintiff Casey Stengel and Decedents Robert Ruff and Michael Noe.

If your unanimous answer to this question is no as to all of the Plaintiffs' claims, then you should return verdicts in favor of the Defendant.

If your unanimous answer is yes regarding any of the Plaintiffs' claims, then you must proceed to a resolution of the second issue regarding that claim or claims as next stated.

Two: Did the Defendant act within the bounds or limits of the lawful authority given to him under state law or municipal regulation?

If your unanimous answer to this question is yes on those claims you are still considering, you should return a verdict in favor of the Defendant on those claims.

If your unanimous answer is no on any of the claims or claims still remaining, then you must proceed to a resolution of the third issue regarding those claims or claims as next stated:

Three: Did Plaintiff Casey Stengel and Decedents [p. 773] Robert Ruff and Michael Noe suffer depriva-

tion of life or liberty without due process of law; as explained earlier in the instruction, 'life, liberty and due process of law', by reason of the act or acts of the defendant conducted outside the proper scope of his lawful authority?

If your unanimous answer is no on those claims you are still considering, you should return a verdict in favor of the defendant on those claims.

If your unanimous answer is yes on any of the claim or claims still remaining, you must proceed to a resolution of the issue of damages regarding those claim or claims as next stated.

Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
Eastern Division
(Title omitted in printing)

JOINT EXHIBIT 44(b)
GENERAL ORDER

Columbus Police **Columbus, Ohio**

GENERAL ORDER NO. 70-9D	DATE OF ISSUE July 30, 1970
EFFECTIVE DATE July 30, 1970	RESCINDS General Order 70-1D
SUBJECT Weapons Regulations	REFERENCE Rule Book, Sections 480, 482

PURPOSE: **The purpose of this general order is to clarify the weapons regulations of the Columbus Division of Police as they relate to types of authorized weapons and related equipment, the carrying of personal weapons and related equipment, the responsibility for their inspection, repair and maintenance, and the responsibility to report any discharge of a police weapon.**

I GENERAL INFORMATION

A. **Carrying a Weapon on Duty**

Members of the Division of Police, while on duty, shall carry the weapon and ammunition issued to them.

1. Carrying a Personal Weapon on Duty
Members of the Division of Police desiring to carry a personal handgun **in addition to** their issue revolver shall request permission through the Police Range Officer. The Range Officer, after the weapon has been inspected and registered, shall forward the request to the Chief of Police for approval. Permission may be granted provided the following conditions are met:
   a. The weapon shall be inspected, registered and approved by the Police Range Officer.
   b. The weapon shall not exceed .38 caliber.
      (1) The .357 Magnum is prohibited.

B. **Carrying a Weapon Off Duty**

Members of the Division of Police, while off duty, shall carry the weapon and ammunition issued to them.

1. Carrying a Personal Weapon Off Duty
Members of the Division of Police desiring to carry a personal handgun **instead of** their issue revolver shall request permission through the Police Range Officer. The Range Officer, after the weapon has been inspected and registered, shall forward the request to the Chief of Police for approval. Permission may be granted provided the following conditions are met:
   a. The weapon shall be inspected, registered and approved by the Police Range Officer.

   b. The weapon shall not exceed a .38 caliber.
      (1) The .357 Magnum is prohibited.

It is recognized that there may be certain occasions when carrying a weapon while off duty would be impractical. An example is when a member is engaged in some sport or activity and the accepted style of clothing would restrict or preclude the carrying of a weapon.

Therefore, it is up to the good judgment of each member as to when it would be impractical to carry a weapon while off duty. If the member feels that the circumstances so warrant, he need not carry the weapon while off duty; however, justification for failing to do so may be required.

C. **Type of Handgun Ammunition Specified**

1. Regulation Super Vel 110 grain, .38 special, semi-ball, solid nose, factory load cartridges shall be carried and used at all times.
   a. In those cases where carrying a personal handgun has been authorized, appropriate ammunition may be carried and used.
2. No military or other jacketed bullet ammunition shall be carried. Dum-dum, hollow-point, wad-cutter, tracers or handloads shall not be carried or used at any time.

II INSPECTION, REPAIR AND MAINTENANCE OF WEAPONS

A. Periodic Inspection Required

Supervisory officers are responsible for the periodic inspection of all issued or authorized weapons and related equipment carried by their subordinates, in order to insure that they are in proper working order and fully comply with the provisions of this order.

B. Repair and Maintenance of Issued Weapons and Related Equipment

All issued weapons and related equipment in need of repair, adjustment or refinishing shall be submitted to the Police Range Officer.

1. Members of the Division of Police shall not permit any person, except those authorized by the Police Range Officer to perform repair work of any kind on any issued weapon or related equipment.
2. Members of the Division of Police shall be held strictly accountable for any damage to issued weapons or related equipment, which is caused by roughness, carelessness, or by permitting any unauthorized person to use, tamper with or repair his weapon or related equipment.

III CERTAIN WEAPONS PROHIBITED

A. General

No member or employee of the Division of Police shall carry, have in his possession or use, at any time, any weapon of the type commonly referred to as "brass knuckles" or other similar weapons.

1. Any weapon, worn on the hand or concealed in gloves, made of a hard material (metal, wood, plastic, etc.) shall be prohibited by this order.
2. This order does not prohibit the carrying or use of the night stick, riot baton or black-jack.

B. Rifles and Shotguns

Members and employees of the Division of Police are prohibited from carrying, having in their possession or using any personal weapons such as rifles, carbines or shotguns, of any description, while on duty.

C. Other Weapons

Members and employees of the Division of Police are prohibited from carrying, having in their possession or using any personal weapons such as automatic or semi-automatic rifles, carbines or shotguns, of any description, while on duty.

IV REPORTING REQUIREMENTS

A. Procedure to be Followed When Firearm is Discharged

1. An officer shall be subject to discipline if the shooting of a firearm involves:
   a. A violation of law by him.
   b. A violation of department regulations.
   c. Poor judgment involving wanton disregard of public safety.

d. Accidental discharge of gun through carelessness or horseplay.

2. In order to enforce the guidelines for use of weapons, the Police Division shall require a detailed written report on all discharges of firearms except at an approved range.
   a. Whenever a police officer discharges his firearm, either accidentally or in the performance of police duty, he shall verbally notify his immediate on-duty supervisor as soon as time and circumstances permit. Further, a police officer who discharges his firearm shall forward a written report of the incident through established channels to the police chief and a carbon copy to his superior officer within his tour of duty of the incident.

3. Each discharge of a firearm, except at an approved range, shall be investigated by an on-duty commanding officer. After conducting a thorough investigation of the circumstances surrounding the discharge of firearms, the commanding officer shall submit a detailed written report of the results of the investigation to the police chief through channels.

BY ORDER OF:
DWIGHT W. JOSEPH
Chief of Police
APPROVED BY:
JAMES J. HUGHES, JR.
Director of Public Safety

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Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division

(Title omitted in printing)

JOINT EXHIBIT 24(a-j)

JOINT EXHIBIT 24(a)

Form C-71—Public Employee

INSTRUCTIONS: Under R. C. 4123.28 of The Ohio Workmen's Compensation Act, every employer shall keep a record of ALL injuries received by his employees in the course of their employment and report these injuries to the Bureau of Workmen's Compensation WITHIN ONE WEEK after the accident. This form C-71 is to be used only in cases where the injury causes a disability of MORE THAN ONE WEEK. It should be completed and signed by the injured employee and his employer and mailed to the nearest office of the Bureau of Workmen's Compensation. Office addresses on reverse side of this application.

STATE OF OHIO

BUREAU OF WORKMEN'S COMPENSATION — Claim No. P.E. 585582

Claimant's Application For Compensation

1. CLAIMANT'S NAME ~~Raymond~~ (First) L. (Middle Initial) Belcher (Last)
2. Home Address 2887 (Number) Perdue (Street) Franklin (County) Columbus (City) Ohio (State)
3. Age 35 Social Security No. 289-30-1029 No. of dependents ____

   Name and address of employer: City of Columbus - Division of Police ~~181 S. Washington Blvd., Columbus, Ohio 43215~~
4. Date of Injury: 3 (Month) 1 (Day) 71 (Year) Hour 2:15 A.M. ____ P.M.
5. Date quit work: March 1, 1971 (Date last worked) Date returned to work: ____ (Month, day, year)
6. Did you receive your wages during disability? Yes Occupation: Patrolman (Welder, etc.)
7. Description of Injury: ~~He was defending himself from three male subjects who kicked him and beat him about the face, neck and chest.~~ (Describe in detail what happened) (Loading castings, shoveling sand, operating machine, etc.) (State the material, tool, apparatus, etc. or injury. Owner of automobile or vehicle, name part: gears, pulley, shaft, motor, etc.)
8. Injury occurred where? Columbus, Franklin, Ohio (City, County, State) On employer's premises? No (Yes or No)
9. Describe nature of injury and part of body affected: ~~Abrasions and contusions of the neck,~~ face and chest. (Amputation of finger, laceration of leg, back strain, etc.)
10. Names and addresses of witnesses: ____

In this column
Age
Sex & c.c.
Dependents
Location (Geo.)
Date Report Filed
Date of Injury
Report Lag
Hearing Lag
Payment Lag
Occupation
Experience
Agency
Agency Part
Type of Injury

11. If hospitalized, name of hospital: Grant Hospital E.R. 3-30-71
12. Name and address of physician: 309 E. State Street, Columbus, Ohio 43215
13. Have you filed a previous application concerning this injury? ____ If so, give claim number: ____
14. Have you filed other claims for injury with this Bureau? ____ If so, give claim numbers and part of body injured: ____
15. Names of all employers for whom you worked during year prior to this injury: ____
16. What doctors have you consulted or been treated by within the last two years, and for what illness or [illegible]? ____ (If none, so state)

I hereby make application to The Bureau of Workmen's Compensation for the payment of money out of the State Insurance Fund for compensation for injuries sustained in the course of my employment, and which have not been purposely self-inflicted, and for money to pay for medical services, etc., which medical services, etc., were necessary in the treatment of my said injuries. Notice of hearing is hereby waived.

I HEREBY AUTHORIZE The Bureau of Workmen's Compensation to pay any or all awards for medical, hospital and similar service directly to person or persons rendering such service.

By signing this application I expressly waive, on behalf of myself and of any person who shall have any interest in this claim, all provisions of law forbidding any physician or other person who has heretofore attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which they thereby acquired. I have read all the statements contained herein and know the same to be true and correct.

(If applicant signs by mark two witnesses must sign here.) (Signature of applicant. If unable to sign, mark must be made.)

Street Address 2887 Perdue Ave.

City or Town Columbus, Ohio

PART II.

Employer's Report of Industrial Injury

1. Name of employer: CITY OF COLUMBUS (Name as shown on Insurance Certificate)
2. Office address: 181 S. Washington Blv., Columbus, Ohio 43215
3. Type of organization: City Municipal (State, City, Village, School District, County or Township)
4. Do you agree with statements of claimant? ____ If not, indicate the points of disagreement: ____

[illegible] date of injury, date quit work, accident description, nature of injury, correct? Make separate report if necessary.)

5. Said city or village does ____ maintain a duly authorized Police or Fire Pension Fund.

- Was employee a regular employee or charity or relief worker? ____

Nature of Injury
Part of Body
Full Wage
Average Wage
Treatment
Complications
Degree of Injury
Days Lost
Coded by

...of injury March 1, 19 ___ 19___ to ___ 19___

For ~~week~~ period ending	Amount of earnings during week	No. days employed during week	For week ending	Amount of earnings during week	No. days employed during week
	bi-weekly	bi-weekly			
3/1/79 373.50					

7. If meals, lodging, tips, etc. were received in addition to wages, describe and state weekly value $ ___
8. Will employee receive wages or meals and lodging during period of disability? Yes
Indicate what part, if any: WAGES ONLY
9. If employee did not work on any days during the period shown on Wage Report (Item 6), state reasons: (Personal, plant shut down, other injuries, illness, etc.)
10. Out of what funds were employee's earnings paid?

By signing below, I do hereby certify that I have authority to execute this Employer's Report and that the answers to the questions given in said report are correct to the best of my information and belief. By signing this report, the employer certifies that this is a valid claim, requests that compensation be paid claimant forthwith and waives notice of receipt of claim as well as notice of order of compensation from the Bureau of Workmen's Compensation Administrator as provided in R. C. 4123.512-513.

(Name of person signing report)
John E. Pagnard, Safety Coordinator
Department of Industrial Relations
(Official title of person signing and his department)

For City of Columbus, Ohio
(Name of employer as shown on Insurance Certificate)

Offices of The Bureau of Workmen's Compensation

JOINT EXHIBIT 24(b)

...Division of Police 24(C)
COLUMBUS, OHIO

NAME Raymond Belcher March 22 1972 Time 933
PHONE 475-1094 RESIDENCE 2887 Perdue

Reported Sick-Injured, at 932 P.M. March 22 1972. I have notified Dr. Fangmann to examine him, and have also notified Sgt. Gomez Shown to investigate the matter.

Officer in Charge of Headquarters.

DISABLED OFFICER'S STATEMENT

I hereby certify that I am Sick-Injured, and that said disability was the result of

Old Back Injury — 3/1-'71.

Date March 22 1972 Signed Raymond Belcher

SUPERIOR OFFICER'S REPORT AND RECOMMENDATION

March 22 1972

I have investigated the above case, and find the facts to be as follows:

ILLNESS: ☒
or Same as Above
INJURY:
ON DUTY ☐
OFF DUTY ☐

Signed James D. Legg Rank Patrolman

CERTIFICATE OF DISABILITY

Raymond Belcher

Rank Patrolman

Certified off duty 3-22 1972

Certified for duty 19

Jan.	July		
Feb.	Aug.		
Mar.	Sept.		
April	Oct.		
May	Nov.		
June	Dec.		

Police Surgeon

JOINT EXHIBIT

Officer HER 24 1972 has recovered from his disability, and hereby certify him to be physically able to perform REGULAR DUTY

Police Surgeon

HAVE YOU WORKED ON ANY OTHER JOB IN PAST 24 HOURS
WHERE
HOURS

Police Surgeon

((.

☐ EMERGENCY NO TIME LOST

CERTIFICATE OF DISABILITY

Ptlm Raymond Belcher

Rank Ptlm

Certified off duty 7-1 19 71.

Certified for duty ..... 19 .....

Jan.	July.
Feb.	Aug.
Mar.	Sept.
April.	Oct.
May.	Nov.
June.	Dec.

July 1 19 71.

I hereby certify I have examined

Raymond Belcher

and find him not capable of performing duty. By reason of, (here state nature of, and anatomical location of disease or injury and how it incapacitates him.)

Old back injury
(3/1-71)

Police Surgeon.

((.

JOINT EXHIBIT 24(a)

Officer .....

has recovered from his disability, and I hereby certify him to be physically able to perform REGULAR DUTY

.....

.....

.....

.....
Police Surgeon.

HAVE YOU WORKED ON ANY OTHER JOB IN

PAST 24 HOURS .....

WHERE No

HOURS .....

FORM 80-937

((.

JOINT EXHIBIT 24(a)

REPORT OF EMPLOYEE'S RETURN TO WORK

NOTICE TO EMPLOYER:—Detach this card and return when the below named employee resumes work, either with your Company or some other employer. It is extremely important that you promptly forward this report to the Bureau WHEN DISABILITY CEASES.

Claim No. PE-585582 Name Raymond L. Belcher

The above employee returned to work on the ..... day of ....., 19....

Remarks .....

Employer .....

By .....

If the employee has not return to work as soon as able this Bureau should be notified of the fact.

Form C-12-A

State of Ohio
Bureau of Workmen's Compensation
Columbus, Ohio

Claim No.
PE-585582

Name
Raymond L. Belcher

Date of Injury
3-1-71

See reverse side

MAR 29 1971

U.S. POSTAGE

City of Columbus
181 S. Washington Blvd.
Columbus, Ohio 43215

OHIO

PART II. **Attending Physician's Report and Fee Bill**

INSTRUCTIONS FOR PHYSICIAN: This form must be completed and returned to the employer within two [illegible] of first treatment. The employer shall then submit the form to the Bureau. If the attending physician's report [illegible] treatment is needed, Form C-19 bearing the claim number will be sent to the physician.

1. Give diagnosis and description of injury *Lumbo-sacral strain*

2. Was there evidence of head injury? .... Back Injury? *✓* .... Infection? ....

3. If hospital, ambulance, nursing or x-ray services were ordered by you, submit names and addresses

What further treatment is indicated, if any? *8-10 treatments - heat & passive motion*

5. Number of days claimant was disabled from work? *30 days*

ITEMIZED FEE BILL FOR NOT MORE THAN TWO WEEKS' TREATMENT
Fees should be submitted in accordance with the published Fee Schedule.

Date	Where Rendered	Description of Treatment	Amount
3-20-72	Office	Exam - Treatment - Heat & Passive Motion	7 50
3-27-72	Office	Treatment - Heat & Passive Motion	7 50
4-19-72	Office	Treatment - Heat & Passive Motion	5 00
		Total	20 00

If this bill or any part of it has been paid, indicate credit here.

Designate by whom paid.

I hereby certify that all the treatments covered by fee bill above were rendered solely on account of injury described above and were rendered by me personally or under my personal direction. (If interne or hospital resident, please so state)

Dr. Robert E. Manza (Signature of Physician)

IMPORTANT: To Expedite Payment Include Payee Number No. *831*

Street Address *114 West 3rd Ave.*

City *Columbus, Ohio 43201*

HOSPITAL FEE BILL (For Emergency Fee Only)

Date of emergency treatment .... Service performed ....

Amount of bill $ ....

The undersigned certifies that these services have been rendered for the claimant named herein.

Contract Number .... (Hospital)

By ....

Address .... (Number) (Street) (City)

FOR DEPARTMENT USE—DO NOT FILL OUT
BILLS TO BE PAID

[illegible] 6/1/72

Med. Serv. $ .... Code ....

Hospital $ .... Code ....

Miscel. $ .... Code ....

[illegible] 9-15-72

Examiner ....

NOTICE OF RECOVERY FROM DISAB ..Y OCT 25 1972

JOINT EXHIBIT 2-(9)

SAFETY CO-ORDINATOR

9/1/72
(Date)

Dept.
Department

R. [illegible] B. [illegible], was absent from work because of ☐ illness
(Name of employee)

or ☒ *disability.

He/She may return to ☒ regular duty on 9/1/72
☐ light duty

Limitations, if any .....

☒ Doctor's Release

[illegible] M.D.
City Physician

☐ No Doctor's Release

*Service connected disabilities must be certified separately by Chief City Physician. (See Ordinance #900-65 Section 15).

1st day off 8-28 1972
Return to work on 9-2 1972
Number of days off 3

Department or Division Head

CHD-EC-5 (3-66)

234

/

SECTION III—REPORT OF TIME LOST

JUL 17 1972

1. Employee's name BELCHER, RAYMOND Date of injury 3-1-71
2. Date quit work 7-1-72 Date returned to work 7-13-72
3. Did employee return to: light duty? ..... regular duty? ✓
4. Total CALENDAR days lost—not counting day of injury 12 days

Marjorie Kelley, LN
Signature Title

Police Dept.
Department or Division

This portion must be filled out and returned to the Department of Industrial Relations just as soon as the employee returns to work.

WHAT DID THIS ACCIDENT COST YOU IN TIME, SUFFERING, INCONVENIENCE, MONEY?

235

EXHIBIT
2446

286

SECTION III—REPORT OF TIME LOST

1. Employee's name BELCHER, Raymond Date of injury 3-1-'71
2. Date quit work 3-22-'72 Date returned to work 4-21-72
3. Did employee return to: light duty? ..... regular duty? ✓
4. Total CALENDAR days lost—not counting day of injury 30 days

Signature Marjorie Kinney, Col. Title

This portion must be filled out and returned to the Department of Industrial Relations just as soon as the employee returns to work.

Police Dept.
Department or Division

WHAT DID THIS ACCIDENT COST YOU IN TIME, SUFFERING, INCONVENIENCE, MONEY?

3-[illegible]-1972

He was injured on 3-1-[illegible]71 when he was attacked by three male subjects. Industrial papers were filed and claim allowed by Industrial Commission. He was off from work on March 23, 1972 through April 21, 1972.

MAR 24 1972

Date March 23, 1972.

Chief City Physician
Employees Clinic

John E. Pegnard, Safety Coordinator

Raymond Belcher marked off on 3-22-72 due to a reoccurence of ~~or result of~~ an injury on duty received on 3-1-71.

(PE# _____).

Reason for mark off: OLD BACK INJURY.

Please indicate on this form: Injury on duty - deduct from injury leave

Not Injury on duty - deduct from sick leave

Chief City Physician

Return this form to Personnel, Room 500, Police Department

NURSE 512

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JOINT EXHIBIT 24(I)

Date July 5, 1972.

Chief City Physician
Employees Clinic

Raymond Belcher marked off on 7-1-72 due to
a reoccurence of ~~disability~~ an injury on duty received on 3-1-71.
(PE# 539994).

Reason for mark off: OLD BACK INJURY.
Cruiser accident

Please indicate on this form: Injury on duty - deduct from injury leave
Not Injury on duty - deduct from sick leave

Chief City Physician

Return this form to ~~Personnel~~ Room 606, Police Department
512

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11-7

Department of Public Safety—Division of Police
COLUMBUS, OHIO

JUL 6 1972

NAME Plt. Raymond Belcher 7-1 1972 Time 1610 P.M.
PHONE 475-1099 RESIDENCE 2887 Perdue
Reported Sick-Injured, at K-10 Cpl 7-1 1972 I have notified Dr. Mc48n
to examine him, and have also notified Sgt Ball to investigate the matter.
Capt Bailey
Officer in Charge of Headquarters.

DISABLED OFFICER'S STATEMENT

I hereby certify that I am Sick-Injured, and that said disability was the result of

Old Back Injury (injury = 3/1-71)

Date 7-1 1972 Signed Raymond

SUPERIOR OFFICER'S REPORT AND RECOMMENDATION

7-1 1972

I have investigated the above case, and find the facts to be as follows:

ILLNESS: ☐
or
INJURY:
ON DUTY ☐ Same As Above
OFF DUTY ☐

Signed C Ward #158 Rank Plt'm

239

JOINT EXHIBIT 24 (J)

IR FORM 1-A 7-70

CITY OF COLUMBUS

DEPARTMENTAL REPORT OF INJURY OF EMPLOYEE

This form must be completed, in duplicate (white and yellow), and forwarded to the Department of Industrial Relations within twenty-four hours following all injuries and/or occupational diseases. In every case the injured employee must report to the Employee's Clinic promptly, bearing admission notice from his immediate supervisor. When signed by the City Physician, Notice is returned by employee to his supervisor. In LOST TIME INJURIES the bottom portion, Section III, of this form must be detached and held by the Department or Division. This portion must be completed and returned to the Department of Industrial Relations as soon as the employee has returned to work. (Note: LOST TIME does not begin until the day following the injury). Be sure that every part of the report is completed and every question answered.

SECTION I

1. Employee's Name Raymond L. Belcher Title PATROLMAN Age 35
2. Date of Injury 7-1-71 Date Reported 7-1-71 Time of Injury 2:15 AM ~~PM~~
3. Describe in detail how accident occurred, giving exact location and any tools, machinery, or outside influences involved, and the part of body affected:
   R. BELCHER WAS IN JIMMIE'S BAR 2338 SUMMIT ST. WHEN 3 INDIVIDUALS ATTACKED HIM AND BEGAN BEATING, CAUSING ABRASIONS & CONTUSIONS ON THE CHEST, FACE & NECK

Witnesses to Injury, if any:

Raymond L. Belcher
Signature of Injured Employee

Name (Last)
Address: (Street)
Social Security Number

SECTION II

To Be Filled In By Supervisor

4. Severity of Injury: (Check One) First Aid ✓ Lost Time ✓ Death

5. Check the following unsafe acts and/or conditions that caused this accident.

UNSAFE ACTS	UNSAFE CONDITIONS
a. Careless or unsafe operation	a. Improper safety devices
b. Unauthorized operation	b. Improper safety equipt.
c. Failure to use safety devices	c. Improper safety clothing
d. Failure to use safety equipt.	d. Improper or defective tools
e. Foolish act (horseplay)	e. Improper training for job
f. Unsafe speed (too fast or slow)	f. Hazardous layout
	g. Poor ventilation

Remarks:

6. Why did employee perform unsafe act or why did unsafe conditions exist?

7. What have you done to eliminate the unsafe acts or conditions that caused this injury?

8. Extent of Injury: Abrasion ✓; Amputation; Contusion ✓; Fracture; Foreign Body; Hernia; Laceration; Sprain or Strain; Other (explain fully)

9. Part of Body Affected: Arm(s): R. L.; Back - specify exact area of back affected; Chest ✓; Eye(s) R. L. Foot: R. L. Both; (If toes specify which) Hand(s): R. L. Both; (If fingers specify which) Head ✓; Leg(s) R. L.; Internal Other (explain fully)

10. First Aid Rendered by: GIANT Hospital

11. Name and Address of Attending Physician Dr. E. OAKLAND

C-1

Tab 1

Ralph D. Malloy #1178
Signature of Supervisor

Signature of Division Head

NOTE: For lost time because of injury, injury leave may be granted only upon approval of City Physician.

Name (First, Last) Department or Division Title, No.
City or Town Zip Code
Name Title, No.

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Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

JOINT EXHIBIT 26

STATEMENT OF FACT of JAMES COMSTON, made in the presence of Detective Sergeant Pleasant Hopkins, Detective Marlin Hardin, Detective Ewell Young, and Pat Speakmon, Stenographer. Statement conducted in the Investigation Office, Third Floor, Central Police Station, Columbus, Ohio, on March 1, 1971, at 5:55 A.M. Questions by Det. Sgt. P. Hopkins. Notes and transcript by Stenographer Speakmon.

This statement is reference OR 7506-71, aggravated assault in the name of Raymond Lee Belcher.

* * * * * * * * *

Q. Would you state your name please? A. James Allen Comston.

Q. How old are you Mr. Comston? A. 37.

Q. Where do you live? A. 2345 N. 4th.

Q. Your 'phone number? A. 263-1258.

Q. I'm going to call your attention to an aggravated assault report 7506, which happened at 2338 Summit St., Jimmy's Cafe, at approximately 2 AM this date. Would you tell me in your own words what took place? A. Well, it was started out as an argument to begin with, then this woman jumped up slapped this guy and he hit her back, then that's when the officer got up, take, take a hand in it.

Q. Wait a minute, now there was an argument happened at the bar is that correct? A. Yes.

Q. Do you know anyone's name that was in that argument? A. I only know the woman.

Q. What is her name? A. Agnes.

Q. When this altercation was taking place, who was with you in your booth? A. There, it was Ray and my wife.

Q. By this you mean Raymond Lee Belcher, a Columbus Police Officer? A. Yes, he's an officer, but I didn't know his last name.

Q. When the altercation took place did Mr. Belcher get out of the booth? A. Yes, he got out of the booth.

Q. Was he going to the 'phone to call other officers, or what was his reason for getting out of the booth? A. That I don't know, he, all I know is that he got up out of the booth and the fight started, this guy had him on the floor and he shot.

Q. All right, by two guys you mean two guys that were in the bar in the altercation? A. Yes, three young kids.

Q. When they jumped on Ray as you know him, they knocked him to the floor is that correct? A. Yes.

Q. What happened after he was on the floor? Did anything take place while the policeman was on the floor? A. All I know I just heard shots.

Q. Did you see the officer spray any gas? Tear gas at anytime? A. No.

Q. Did you see the two gentlemen that were beating the officer, striking him or anything, what did they do? A. They was hitting him.

Q. What were they hitting him with? A. Their fist, they didn't have anything else, just their fists, and that third one he went out, he started outside and the officer went outside right behind him.

Q. Did you see anyone kick Ray? With their feet or stomp on him? A. No I didn't.

Q. Did you see a man with a red polka-dot shirt? A. Yes.

Q. Was this man attacking Ray? A. Yes, he was one of them.

Q. Just exactly how was he attacking him? A. He Ray had one of the guys, the one in the polka-dot he jumped Ray, on there to help his buddy out.

Q. I'll show you a picture #88379, would this be that gentleman? A. Yes, that's one of them.

Q. Do you have anything Detective Hardin? A. (Det. Hardin) No.

Q. Do you have anything Detective Young? A. (Det. Young) No.

Q. Calling your attention to the scene at the time, was there any physical evidence you found at the scene Detective Young you would like to put in this statement? A. (Det. Young) Yes, I found an expended .32 caliber casing in the southwest corner of this bar by the jukebox, and also found another casing of like caliber out on the sidewalk right beneath the window of this bar at 2338 Summit.

Q. All right, Mr. Comston, has anyone threatened or promised you anything for making these statements? A. No.

Q. Are they true to the best of your knowledge? A. Yes.

STATEMENT OF FACT.
TIME: 6:05 A.M.

Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
Eastern Division
(Title omitted in printing)
JOINT EXHIBIT 42

department report received 3/2/71
this is Industrial J.P.

MAR 2 1971

Date 3-2-71

Chief City Physician
Employees Clinic

Raymond Belcher marked off on 3-1-71 due to

a reoccurence of or result of an injury on duty received on 3-1-71 2:15 AM.

(PE # in process).

Reason for mark-off: Abrasions and contusions about head neck, face, body
attacked by 3 male subjects -

Please indicate on this form: Injury on duty - deduct from injury leave ☒

Not Injury on duty - deduct from sick leave ☐

Grant Hospital E.R.

[signature] Chief City Physician

Return this form to Personnel, Room 500, Police Department

although this officer was "off duty" - he was in line of duty under circumstances relating to police duties J.P.

Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

JOINT EXHIBIT 43

CITY OF COLUMBUS, OHIO
DEPARTMENT OF PUBLIC SAFETY

April 8, 1971

TO: Officer Raymond Lee Belcher, Badge 661
THRU: Chief of Police
RE: Board of Inquiry Proceedings relating to the incident of March 1, 1971 at Jimmie's Cafe, 2338 Summit Street

Dear Officer Belcher:

I have reviewed the various materials forwarded to me by the Chief of Police consisting primarily of the statements, summaries, hospital files, progress reports, statements of fact, interim reports, use of force reports and other materials assembled in connection with the above captioned incident. I have also reviewed the various reports issued by the Bureau of Internal Affairs.

After a careful review of the above and following personal discussion with the various members of the Board of Inquiry, the Chief of Police and the Internal Affairs Bureau, it is my finding that the discharge of your weapon was proper under the circumstances and the injuries inflicted thereby were justifiable. Particular note is given to the fact that you attempted to defend yourself with chemical mace prior to the use of your weapon. It is further my opinion that at the time you discharged your weapon you were in great peril, unable to retreat and ultimately could have suffered great bodily harm or even death as a result of an unprovoked attack upon you.

The inquiry is hereby closed with a specific finding that your actions were in the line of duty, your weapon was used only in self defense and that you resorted to deadly force only after all other courses available to you had been exhausted. The Board of Inquiry is discharged and the case is dismissed.

Sincerely,

JAMES J. HUGHES, JR.

Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

JOINT EXHIBIT 48

CORONER'S REPORT.
FINDING OF FACTS AND VERDICT

Rev. Code, Secs. 313.11 to 313.99

Coroner's Office, Franklin County, Ohio,
Columbus, Ohio, March 1st, 1971

INQUEST OVER THE DEAD BODY OF
Michael J. D. Noe

BE IT REMEMBERED, That on the 1st day of March in the year 1971, information was given to me, Robert A. Evans, M.D. Coroner of said Franklin County, Ohio, that the dead body of Michael J. D. Noe a person whose death occurred in a suspicious or an unusual manner, had been found within said County. Whereupon I went forthwith to Franklin County Morgue, Columbus, Ohio the place where such body was, and issued subpoenas to None such witnesses as I deemed necessary; and which subpoenas were duly returned endorsed as follows: None.

I administered the usual oath to said witness None and proceeded to inquire how the deceased came to his death, whether by violence to self or from any other person or persons, by whom, whether as principals or accessories before or after the fact, and all the circumstances relating thereto. The testimony of said

witnesses was reduced to writing and by them respectively subscribed.

After examining the body, hearing the evidence and statements of relatives and other persons having adequate knowledge of the facts, and securing such other information as was available, I made, or caused to be made, an autopsy by Franklin County Morgue, Columbus, Ohio.

I do find that the said deceased came to his death by Justifiable Homicide, Massive internal hemorrhage, Perforation of the heart, Bullet wound of the chest.

This 24-year-old white male was, allegedly, shot by a law enforcement officer as he was physically attacking the officer while in Jimmie's Cafe at 2338 Summit Street. He was pronounced dead-on-arrival at University Hospital at approximately 2:45 a.m., March 1, 1971.

Final Diagnosis: Bullet wound of the left chest. Puncture wounds of the left lung; left upper lung, left lower lobe. Laceration of the heart, left ventricle. Hemothorax, left 2600 cc. Hemopericardium, 50 cc. Fracture of the 9th vertebral body.

As I deemed it necessary, I caused said ..... witnesses attending as aforesaid, to enter into recognizance, in the sum of .....Dollars, for their appearance at the succeeding term of the court of Common Pleas of said County, to give testimony concerning the matter aforesaid.

And said ..... witnesses attending as aforesaid, neglecting to comply with the requirements made, I committed h to the prison of said County there to remain until discharged by due course of law.

I having found that the deceased came to h death by force or violence, and by .....

I forthwith informed the Prosecuting Attorney of said County of the facts as found.

The following is a description of the person over whose body the inquest was held:

Name Michael J. D. Noe

Residence 42 West Patterson Avenue, Columbus, Ohio

Place of nativity America

Age 24 yr. Sex Male Color White

Color of eyes Brown Color of hair Light Brown

Marks.....

Height 5'9" Weight 155 lbs.

Occupation Driver for Hills Cab Company

Funeral arrangements by Southwick Funeral Home, Columbus, Ohio.

ROBERT A. EVANS, M.D.
Coroner of Franklin County, Ohio

The State of Ohio, Franklin County, ss.

I, Robert A. Evans, M.D. Coroner of said County, do hereby certify that the foregoing is my finding of facts, in writing and subscribed by me, upon the inquest held by me as such Coroner, over the dead body of Michael J. D. Noe found within said County, and whose death occurred in a suspicious or an unusual manner.

IN WITNESS WHEREOF, I have hereunto set by hand and affixed my seal at Columbus, Ohio, this 1st day of March, 1971.

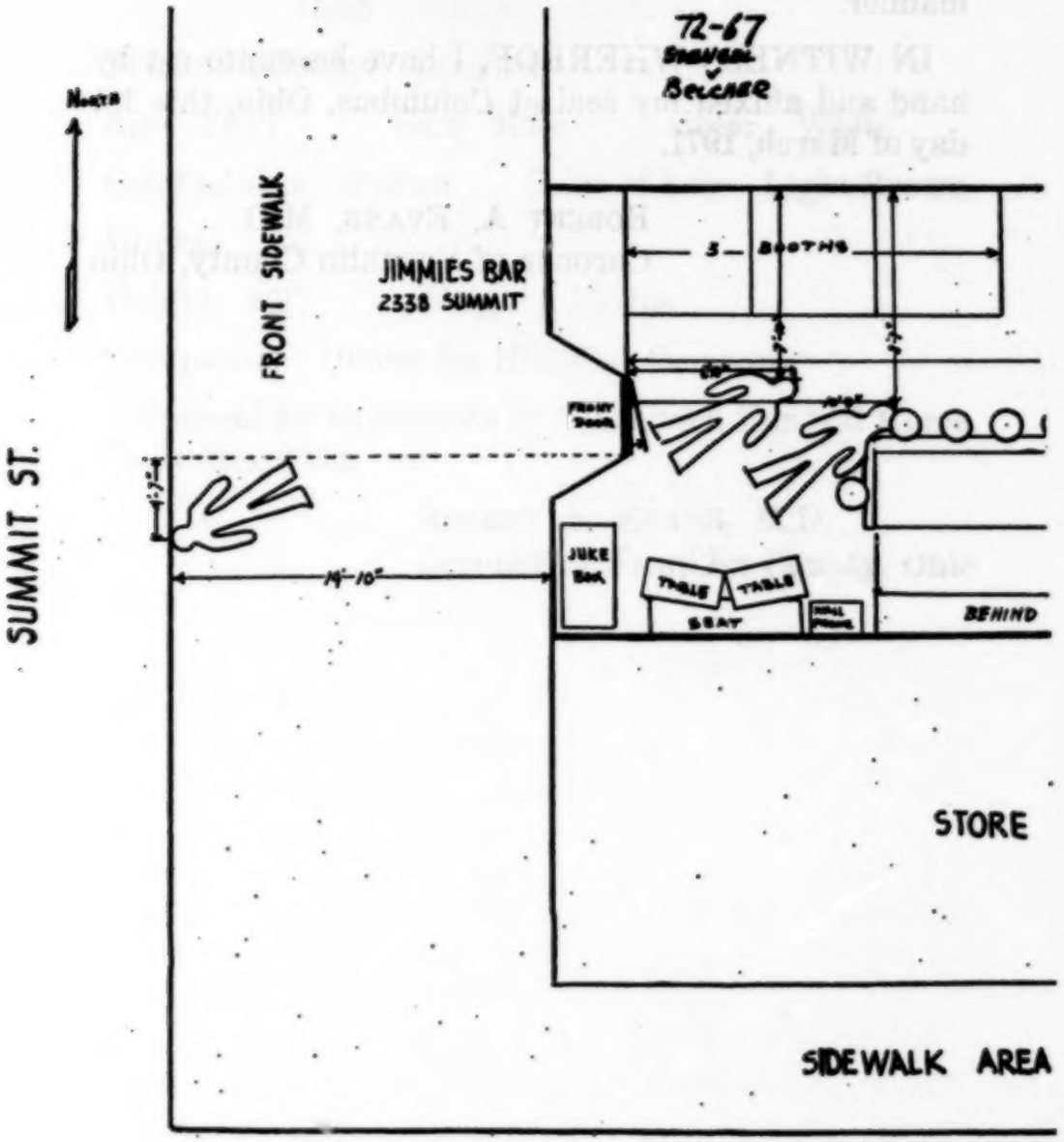
ROBERT A. EVANS, M.D.
Coroner of Franklin County, Ohio

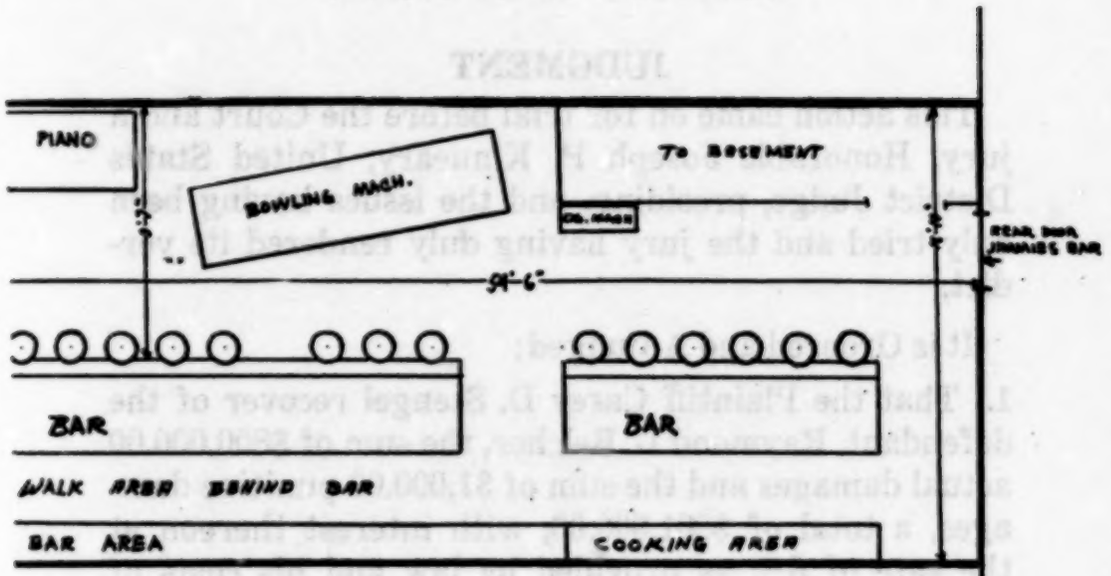
Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

JOINT EXHIBIT 78





UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

Civil Action File No. 72-67

CASEY D. STENGEL, et al.,
vs.
RAYMOND L. BELCHER

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Joseph P. Kinneary, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged:

1. That the Plaintiff Casey D. Stengel recover of the defendant, Raymond L. Belcher, the sum of $800,000.00 actual damages and the sum of $1,000.00 punitive damages, a total of $801,000.00, with interest thereon at the rate of 6% as provided by law and his costs of action;

2. That the plaintiff Charles Ruff, Administrator of the Estate of Robert D. Ruff, Deceased, recover of the defendant Raymond L. Belcher, the sum of $19,000.00 actual damages and the sum of $1,000.00 punitive damages, a total of $20,000.00, with interest thereon at the rate of 6% as provided by law and his costs of action;

3. That the plaintiff Timothy Noe, Administrator of the Estate of Michael J. D. Noe, Deceased, recover

of the defendant Raymond L. Belcher, the sum of $9,000.00 actual damages and the sum of $1,000.00 punitive damages, a total of $10,000.00, with interest thereon at the rate of 6% as provided by law and his costs of action.

Dated at Columbus, Ohio, this 19th day of June, 1974.

JOHN D. LYTER,
Clerk of Court

Civil Action No. 72-67

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division
(Title omitted in printing)

MOTION OF DEFENDANT, RAYMOND L. BELCHER, FOR A JUDGMENT NOTWITHSTANDING THE VERDICT, A NEW TRIAL AND/OR AN ORDER ALTERING OR AMENDING THE JUDGMENT

Now comes the defendant, Raymond L. Belcher, and pursuant to Rule 50(B) and Rules 59(A) and (E) of the Federal Rules of Civil Procedure, moves this Court for a Judgment Notwithstanding the Verdict, a New Trial and/or an Order Altering or Amending the Judgment.

1. As grounds for the Motion for a Judgment Notwithstanding the Verdict, defendant submits that the Judgment is against the manifest weight of the evidence in that defendant's actions were done in self-defense and not under color of law and he is entitled to a judgment as a matter of law.

2. As grounds for the Motion for a New Trial, defendant submits that:

(A) The Court improperly refused to permit cross-examination about, or to admit into evidence testimony regarding the prior

acts of the plaintiff Casey D. Stengel and plaintiffs' decedents, Michael Noe and Robert Ruff, which was to be introduced for the purpose of

(1) showing the character of the plaintiff and plaintiffs' decedents; and
(2) impeachment of the plaintiff Casey D. Stengel; and
(3) showing who was the aggressor in the altercation which gave rise to the cause of action; and
(4) showing proof of motive, opportunity, intent, preparation and plan; and
(5) showing evidence of habit.

(B) The Court, over objections of defense counsel, improperly admitted into evidence certain medical records without the testimony of expert medical witnesses; and

(C) The plaintiffs did not prove their damages beyond a reasonable certainty and thus let the jury speculate as to the amount and the nature of the damages; and

(D) The Court should not have charged the jury with respect to punitive damages because the record is devoid of any evidence of malice on the part of the defendant; and

(E) The verdict of the jury was based upon passion and prejudice.

3. As grounds for the Motion for an Order Altering or Amending the Judgment, the defendant submits that the verdict is excessive and must be remitted to an amount which conforms to the evidence submitted to the jury.

Each of the above three motions is submitted to the Court for consideration separately and in the alternative.

Respectfully submitted,

JAMES J. HUGHES, JR.,
Trial Attorney

DALE A. CRAWFORD,
Trial Attorney
City of Columbus, Department of Law
City Hall, 90 West Broad Street
Columbus, Ohio 43215
Phone: (614) 461-7385
Attorneys for Defendants

PATRICK M. MCGRATH, of counsel

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

CASEY D. STENGEL, et al
Plaintiffs

vs.

RAYMOND BELCHER,
Defendant

Civil Action 72-67

ORDER

This matter is before the Court on plaintiffs' motion for substitution of party plaintiff and on defendant's post-trial motions. Defendant has filed no memorandum contra to plaintiffs' motion. Plaintiffs have filed memoranda contra to defendant's motion, and defendant has filed a reply to plaintiffs' memoranda.

Plaintiff moves to substitute Albert J. Leshy as administrator for the estate of Michael J. D. Noe. The motion is filed pursuant to Rule 25, Fed. R. Civ. Proc. Leshy would be substituted for Timothy Noe, who has been named as administrator of Michael J. D. Noe's estate, but who died since the commencement of the action. Timothy Noe's death was suggested on the record of the case at trial which commenced on June 10, 1974. Plaintiffs' motion was filed August 12, 1974. It was timely filed.

Rule 14(b), Rules of the United States District Court, Southern District of Ohio, states that:

> Upon the filing of the motion, memorandum and certificate, any memorandum contra shall be filed

within twenty (20) days from the date of filing. Failure to file a memorandum contra may be cause for the Court to grant the motion as filed.

Plaintiff's motion was filed on August 12, 1974. More than twenty days has elapsed since the filing of the motion.

Plaintiffs' motion is GRANTED.

Defendant timely moves for a judgment notwithstanding the verdict. The motion is filed pursuant to Rule 50(b), Fed. R. Civ. Proc. He also moves for a new trial or an altering or amending of the judgment. These motions are filed pursuant to Rules 59(a) and (e), Fed. R. Civ. Proc. Both of the Rule 59 motions have been timely filed. Because defendant moved for a directed verdict at the close of all the evidence, his motion is properly taken.

Defendant's motions are DENIED.

WHEREUPON, the Court determines the plaintiffs' motion to substitute a party plaintiff to be meritorious and it is therefore GRANTED, and defendant's motions for a judgment notwithstanding the verdict, for a new trial and for an altering or amending of the judgment to be without merit and they are therefore DENIED.

JOSEPH P. KINNEARY, *Chief Judge*
United States District Court

No. 75 - 823

IN THE

Supreme Court of the United States

October Term, 1975

RAYMOND BELCHER,
Petitioner,

v.

CASEY D. STENGEL, et al.,
Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

John H. Lewis
3316 North High Street
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Attorney for Respondents

BRIEF OF RESPONDENTS OPPOSING PETITION

FOR WRIT OF CERTIORARI

The question which petitioner is trying to present as shown on his page two is not in fact or by any reasonable inference related to the record in the lower courts. A reading of the summary of the case shown in parts of the opinion of the United States Court of Appeals for the Sixth Circuit printed on page 23 through 26 of the petition establishes that the alleged question is not present here.

The direct testimony of the petitioner repeated twice in the petition first at pages 6 and 7 and then at pages 66 through 68 in the petition is an attempt to grossly distort this case to this Court because in the Court of Appeals opinion (page 25 of the petition) in a footnote that Court said "Belcher was impeached on this point by his prior inconsistent statement".

By repeating this impeached version at the beginning and near the end of 69 printed pages petitioner would lead this court to believe that there is a question in this case as they are claiming on page two.

Respondent believes that the unanimous opinion of the Court of Appeals accurately summarizes the record of this case and that important issues which would justify this Court's consideration are not actually present. At this late date petitioner should not be permitted to manufacture a distorted case that might at first blush seem to have important issues.

Respectfully submitted,

John H. Lewis
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Columbus, Ohio 43202
Attorney for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-823

RAYMOND BELCHER,
Petitioner,

v.

CASEY D. STENGEL, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals [reproduced in the Appendix to the Petition for a Writ of Certiorari at 22-35] is reported at 522 F.2d 438.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit was entered on September 16, 1975. The Petition for a Writ of Certiorari was filed December 10, 1975, and was granted April 5, 1976. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTION PRESENTED

Does the fact that an off-duty police officer, out of uniform, is required by police department regulation to carry a weapon at all times, establish that any use of that weapon against the person of another, even though the officer is engaged in private conduct at the time, to be an act "under color of law" within the meaning of 42 U.S.C. §1983?

STATUTORY PROVISION INVOLVED

The applicable statutory provision involved is 42 U.S.C. §1983:

> §1983 Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case arose from an incident in a public bar in Columbus, Ohio, known as Jimmie's Cafe at approximately 1:30 a.m. on March 1, 1973. Respondents' decedents Michael Noe and Robert Ruff and Respondent Casey D. Stengel,[1] three men in their early twenties, became involved in an altercation with other

[1] The following are listed as Plaintiffs in the Complaint, Casey D. Stengel, individually and on behalf of all persons similarly situated; Charles Ruff, Administrator of the Estate of Robert D. Ruff, deceased; and Timothy Noe, Administrator of the Estate of Michael J. D. Noe, deceased. [A. 4]

patrons of the bar including the Petitioner, Raymond Belcher. At the time Raymond Belcher was an off-duty Columbus police officer, out of uniform, and engaged in private social activity. During the affray Raymond Belcher discharged a firearm, striking his assailants and resulting in the deaths of Noe and Ruff and seriously injuring Stengel.

On February 28, 1972, the Respondents brought this action in the United States District Court for the Southern District of Ohio, Eastern Division, under authority of 42 U.S.C. §1983 and §1985 alleging categorically that Raymond Belcher had acted in the performance of his duties and had violated Respondents' civil rights to due process and equal protection of the laws as provided in the Fourteenth Amendment of the Constitution of the United States. Jurisdiction was invoked under 28 U.S.C. §1331 and §1343 [A. 8] In addition to Raymond Belcher, Respondents also named as Defendants the City of Columbus, Ohio, and various police officers and supervisors who were alleged to have conspired to cover up facts of the incident.[2]

Aside from the mere conclusory allegation that Raymond Belcher had acted in the line of duty and the assertion that he had used a weapon which he carried while off-duty pursuant to a police department regulation, the only specific description of Belcher's

[2] The following persons were listed as Defendants in their capacity as Columbus police officers and individually: Chief Dwight Joseph; Captains Francis B. Smith, Robert Taylor, and Richard O. Born; Lieut. Earl Belcher; Sgt. P. Hopkins; Officers James Newell, E. R. Woods, E. Young and John Hawk; and various John Doe officers and administrative officials of the City of Columbus. At the time of trial James J. Hughes, Jr. was substituted as a John Doe Defendant for actions in his capacity as Safety Director of the City of Columbus. Mr. Hughes was dismissed pursuant to motion at the close of the Plaintiffs' case in chief. Mr. Hughes was the City Attorney of Columbus, Ohio, at the time of trial and participated as trial counsel on behalf of all other Defendants.

conduct set forth in the complaint is stated in paragraph 8 thereof as follows:

> "* * * Defendant Raymond L. Belcher, who was out of uniform and in no way identified as a Columbus policeman, and in no way involved in the minor dispute heretofore described, intervened by attacking one of plaintiff's decedent from the rear by grabbing him around the neck from the rear; said intervention by said Raymond L. Belcher being without any notification or attempt to notify anybody in the Cafe that he was an off-duty Columbus policeman and without any attempt by said Raymond L. Belcher to make a police arrest or a citizen's arrest of any kind * * *." [A. 10]

The District Court granted a Motion to Dismiss the City of Columbus. A Motion to Dismiss was filed on behalf of Raymond Belcher raising the jurisdictional defense that the Respondents had failed to properly allege that Belcher had acted under color of law and, in fact, had alleged facts which affirmatively stated that he had not acted under color of law. [A. 25-28] Further, motions to dismiss were filed on behalf of the Chief of Police, Dwight Joseph, the twelve John Doe Defendants, and the ten remaining Defendants all raising the issue of jurisdiction over the subject matter and failure to state a claim upon which relief may be granted. The District Court denied these motions. [A. 29-34] An Answer was filed on behalf of all Defendants on March 30, 1973, asserting, among other defenses, that Raymond Belcher was justified in using his weapon as a matter of self-defense and, again, that the District Court lacked jurisdiction as the Petitioner had not acted "under color of law" during the incident. [A. 35] The "under color of law" issue was also raised

in Defendants' Pre-Trial Statement of the Issues. [A. 37]

The case was tried to a jury with the trial commencing on June 10, 1974. At the close of the Plaintiffs' case in chief, the District Court granted a Motion for a Directed Verdict on behalf of all Defendants with the exception of Raymond Belcher. All Defendants except Belcher were dismissed at that point and, consequently, any claims with respect to 42 U.S.C. §1985. Although during oral argument in support of Raymond Belcher's Motion to Dismiss on the issue of self-defense, defense counsel made a statement which in effect agreed with the District Court's position that Belcher had acted under color of law, the District Court did not accept that as a stipulation of fact or law. [A. 199] The trial then proceeded against Belcher alone for a jury determination of the issues under 42 U.S.C. §1983.

The evidence was uncontradicted that on the morning in question Noe, Ruff and Stengel entered Jimmie's Cafe at approximately 1:00 a.m., ordered drinks, and that Noe and Stengel engaged in playing a "bowling game." [A. 41-43] Shortly thereafter the Petitioner, Raymond Belcher, entered the bar in the company of a Miss Bonnie Lohman and took a seat at a booth near the door. Raymond Belcher was an off-duty Columbus police officer; he was not in uniform and was engaged in private social activity. [A. 167-171] [Joint Ex. 25; R. 499; 529] He had in his possession a can of chemical mace which he carried of his own volition and, in addition, a pistol which he carried pursuant to a regulation of the Columbus police department which required off-duty officers to carry a weapon. [Joint Ex. 44(b); A. 75, 218, R. 529]

It was further undisputed that while Raymond Belcher was seated in the booth with Bonnie Lohman and two other acquaintances, an altercation erupted between Noe and another patron, Mrs. Agnes Morgan. Blows were struck between Noe and Mrs. Morgan resulting in Mrs. Morgan's being knocked either to the floor or against a piano. Mrs. Morgan's husband, Kyle Morgan, then arose and an altercation developed between Noe and Kyle Morgan; Noe being joined by Ruff. The fight escalated and Kyle Morgan ended up on the floor with Noe standing over him. [A. 171-173]

Although the evidence was in dispute as to whether Raymond Belcher became involved in the altercation as an aggressor or as a matter of self-defense, there was absolutely no dispute, and it was set forth in the Complaint, *infra*, that at no time did he identify himself as a police officer or make any attempt to personally effect an arrest, either as a police officer or as a private citizen. [A. 174]

Belcher testified that he observed the fight and knew it should be stopped. He decided to call the police which necessitated leaving the bar and proceeding to a telephone booth on the sidewalk just outside. He felt the Respondents would not permit a telephone call to be made from within the bar. As he arose from his seat he told Bonnie Lohman that he was going to call the police and for her to leave the premises should more trouble occur. Immediately he was attacked from behind by Respondent Stengel, who had positioned himself near the door. [A. 172-174] When Belcher arose he had placed his tear gas cannister in his hand and it went off prematurely through a malfunction, emitting a cloud of gas rather than a liquid stream. [A. 177-178] The gas did not spray anyone in particular but generally went over everyone. Once the gas was emitting Belcher did indicate an intent to spray Respondent Noe who was now coming toward him. [A. 186, 126] Belcher could not remember whether the tear gas actually went off immediately before or after he was attacked by Stengel. [A. 195] Belcher then described the ensuing struggle through to the point where he was compelled to use his weapon as a matter of self-defense:

> "Mr. Stengel began throwing punches, attempting to strike me with his fist, and attempted to throw me to the floor. I grabbed ahold of the booth and again told him to let go of me.
>
> "Mr. Ruff ran across the floor at that point and I was fighting both men. I was tripped or thrown on top of a small table there by the front of the bar itself, I think they are known as cabaret or cafe tables, they are very small tables, maybe two feet square.
>
> "My back went over this table. My head struck the juke box, and I recall being kicked for a moment after that. I was kicked several times and then there was a moment of darkness where I could neither feel nor hear anything. I don't know whether I was unconscious or apparently I was, but how long I was unconscious I have no idea. It could have been ten seconds; it could have been ten minutes.
>
> "As I looked up from the floor with my legs up over a table, I could see nothing but feet and fists. I was being kicked in the face and the head by at least two men.
>
> "At that time I tried to get up off the floor. I literally tried to pull myself up off the floor by using the men's clothing that were on top of me. I at one point had a man's belt in my hand and tried to drag myself up off the floor by his belt buckle,

so I could get up off the floor and defend myself. "I was kicked first one direction, then the other direction. I continued to try to get up off the floor. I was getting tired. I was beginning to lose.

"At that time somewhere in this struggle my tear gas was kicked out of my hand. I had been spraying it, trying to spray directly into these men's faces from the floor but somewhere during the fight the tear gas was stomped from my hand.

"As I began to realize that I wasn't gonna be able to get myself off the floor, I reached for the pistol that I carried in my waistband in my pants. At that time I was carrying a .32 Browning automatic, and the gun was not there.

"I was still being kicked and stomped. I put my arms, my left arm over my face to shield my face from these kicks, and looked across the shiny barroom floor to see if the pistol was lying there some place.

"The gun was not there. The thought went through my mind, oh, God, if these men, whoever they are, find that gun on the floor, they will kill me with my own weapon.

"I felt the pistol underneath my back, still being kicked and stomped. I brought the weapon around in my right hand and shoved backwards to get these men off of me and I fired three shots straight into the ceiling, or straight into the mass of bodies that were on top of me.

" * * *.

Question: "Officer Belcher, as you were laying on the floor after you had come to after you had recovered your weapon, as you removed the weapon from behind your back and pointed it upward . . . what thought was in your mind?"

" * * *."

Answer: "The thought in my mind at that point was that I was going to be killed on that barroom

floor if I did not use the weapon I had, I would be killed." [A. 174-176, 182]

Belcher's testimony of his involvement in the matter was corroborated by all other eye-witnesses with the exception of Stengel. Although Belcher testified to firing three shots inside the bar, he did indicate the weapon discharged during a struggle with Noe outside the bar when Belcher had struck Noe in the face with the pistol still in his hand. [A. 176] Noe was found outside the bar. [R. 294] Belcher stated that Noe was shot inside the bar [A. 189] and the location of his gunshot wound was in the chest. [Joint Ex. 48; 458, 529; A. 249]

Stengel's testimony in regard to Raymond Belcher's involvement did not include evidence bearing on the question of whether or not Belcher acted as a private citizen or pursuant to a police duty. His testimony does not indicate that Belcher had identified himself as a police officer; nor did he know Belcher or understand him to be a police officer. He merely portrayed Belcher as an aggressor.

Stengel testified that Belcher grabbed Robert Ruff from behind and that he (Stengel) in turn grabbed Belcher and threw him to the floor. [A. 46] He also stated that he did not kick Belcher but only kicked at Belcher's hand which grasped the chemical mace. [A. 46, 62] Stengel did state that his head was turned and he could not see Ruff or Belcher immediately prior to the shots' being fired. [A. 47] Stengel's description as to Belcher's involvement was in direct conflict with all other eye-witnesses.

The only other evidence in regard to Belcher's actions came in the form of later developed opinions by certain City officials and police supervisors who

were not eye-witnesses to the incident, but formed the view that Belcher had acted in the line of duty. These opinions were admitted into evidence during Plaintiffs' case in chief wherein the defendant supervisors and officials were questioned in order to establish a conspiracy out of their administrative actions. These Defendants were dismissed at the close of Respondents' evidence. Their testimony established that Belcher had applied for and received workmen's compensation benefits for the injuries he had incurred that evening. [A. 76-79] The Chief of Police of the Columbus Police Department testified that a police officer was required to take action in any type of police or criminal activity twenty-four hours a day and would be disciplined if he did not do so. He was of the opinion that Belcher had acted under the authority of that requirement. [A. 76-77] He also indicated his opinion of the matter was based on the report and statements of the eye-witnesses as gathered by the Firearms Board of Inquiry which included Raymond Belcher's statement. [A. 70, 72] [Joint Ex. 25; R. 420, 529] Also, a letter to Belcher from the Safety Director of the City of Columbus, James J. Hughes, Jr., a Defendant and counsel in the case, was read into evidence which stated that it was the opinion of those police supervisors who comprised the Firearms Board of Inquiry that Belcher was justified in using the firearm. Hughes further stated in the letter his opinion that Belcher acted in the line of duty. [A. 107, 110-111]

At the close of all evidence the issues were submitted to the jury including the question of whether or not Belcher had acted under color of law in the incident. A portion of the District Court's charge to the jury included the following:

> "The manner in which Defendant Belcher may have acted under color of state law was that he carried a gun, a side arm, while off duty. The reason he carried a weapon is because of a police regulation issued by the Chief of Police of the Columbus Police Department which reads in part as follows:
>
> 'Members of the Division of Police while off duty shall carry the weapon and ammunition issued to them:
>
> One: Carrying a personal weapon off duty. Members of the Division of Police desiring to carry a personal hand gun instead of their issued revolver, shall request permission through the Police Range Officer.' " [A. 210]

The jury found that Belcher had acted under color of law as implied in its verdict which awarded Stengel $800,000 in compensatory and $1,000 in punitive damages; Noe's estate $9,000 compensatory and $1,000 punitive damages; and Ruff's estate $19,000 compensatory and $1,000 punitive damages. On June 19, 1974, the District Court entered its judgment reflecting the verdict. [A. 254] On June 28, 1974, Belcher filed a Motion For Judgment Notwithstanding The Verdict again asserting that the evidence did not support the finding that he had acted under color of law. [A. 256] The District Court overruled the motion on September 11, 1974. [A. 259] An appeal was taken to the Sixth Circuit specifically raising the issue as to whether the District Court erred in refusing to direct that Petitioner had not acted under color of law. The case was docketed in the Sixth Circuit as case number 75-1075. On September 16, 1975, the Sixth Circuit rendered its judgment and issued a written opinion

affirming the District Court. [Appendix to Petition for a Writ of Certiorari, page 21]

The question posed herein was consistently raised by pleading and motions of Petitioner in the District Court and on appeal. The question was specifically considered and decided by the Sixth Circuit. [Appendix to Petition for a Writ of Certiorari, pages 22-35]

ARGUMENT

I. The Findings by the Sixth Circuit and the District Court that the Petitioner had acted under color of law established a construction of 42 U.S.C. §1983 which conflicts in principle with the applicable decisions of this Court and Lower Federal Courts. The Decisions below broaden the application of that statute and create implications for its unwarranted extension.

It is Petitioner's contention that the District Court lacked jurisdiction under 42 U.S.C. §1983 in that the Complaint did not properly allege, nor was the evidence sufficient to support a conclusion, that the Petitioner acted under color of law. By overruling Petitioner's Motion to Dismiss, submitting the issue to the jury, and failing to grant Petitioner's Motion for a Judgment Notwithstanding the Verdict, the District Court, as affirmed by the Sixth Circuit, has decided that issue against the existing principles set forth by applicable decisions of this Court and other lower Federal Courts. The evidence did not support the jury's determination, implicit in its verdict, that the Petitioner had acted under color of law. The determinations below, at the very least, broaden the "under color of law" requirement of 42 U.S.C. §1983 and create implications for its unwarranted extension.

42 U.S.C. §1983, originally known as the Ku Klux Act of April 20, 1871, was enacted after the Civil War to establish a federal cause of action to redress deprivations of federal constitutional rights which occurred as a result of state action. From the Act's inception the Supreme Court of the United States has recognized its application provides redress only for actions involving state authority and does not erect a shield against private conduct between individuals, no matter how serious or wrongful such conduct may be. This Court stated in *The Civil Rights Cases*, 109 U.S. 3, 9-12 (1883):

> "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party it is true, whether they affect his person, his property or his reputation; but if not sanctioned in some way by the State, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress."

Although this Court has applied the concept of "under color of law" to official actions which constituted a "misuse of authority," *United States v. Classic*, 313 U.S. 299, 326 (1941) and also to officials who engaged in violence under a "pretense" of law, *Screws v. United States*, 325 U.S. 91, 111 (1945) the Court has never abandoned and has continually emphasized the essential dichotomy between conduct which is wholly private and not within the scope of 42 U.S.C. §1983, and

that which is done in pursuit of one's official duties. In *Screws, supra*, Justice Douglas pointed out the distinction at 325 U.S., pages 108 and 111:

> "We agree that when this statute is applied to the action of the state officials, it should be construed so as to respect the proper balance between the States and the federal government in law enforcement. Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.
> "* * *.
> "* * *.
> "* * *. Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. * * *."

The principles applied in determining the question of whether "state action" is present in terms of the Fourteenth Amendment to the Constitution of the United States are easily analogous to those involved in reviewing whether action "under color of" state law exists. The terms "state action" and "under color of" state law are usually treated as one and the same although it has been recognized that when a private party acts alone, more must be shown to establish that he acts "under color of" a state statute or other authority than is needed to show his actions constitute "state action." *Adickes v. Kress & Co.*, 398 U.S. 144,

210 (1970) [Brennan, J., concurring in part]. Although this Court has not established a clear definition of what is and what is not action under color of law, it has clearly provided that more than a trivial nexus between the entity on the one hand, and the state on the other, is necessary. In *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) this Court stated:

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in *The Civil Rights Cases, supra*, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' *Reitman v. Mulkey*, 387 U.S. 369, 380, 18 L.Ed.2d 830, 838, 87 S. Ct. 1627 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition."

Moreover, the existence of heavy and extensive regulation by the State does not necessarily convert an entity's otherwise private actions into those of the State for purposes of the Fourteenth Amendment.[3] There

[3] Officers of the Division of Police of the City of Columbus are subject to a regulation requiring them to carry a handgun; either, that regularly issued to them by the department, or a personal handgun not to exceed .38 caliber. [A. 217] The regulation does not specify precisely when or under what circumstances the weapon may or may not be used. Furthermore, the regulation does not require the officer to carry the weapon off-duty when the situation would be impractical and leaves the determination of impracticality to the good judgment of each officer. [A. 219]

must be a sufficiently close nexus between the State and the activity complained of in order to consider the activity to be that of the State. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350, 351 (1974).

Furthermore, where the allegation of state action or involvement is not obvious, the question as to its existence emits no easy answer and requires a careful sifting of the facts and circumstances of each particular case. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

In major cases involving the construction to be given the term "under color of" law or state authority, this Court has made its determinations by focusing not upon whether the defendant possessed or used a physical instrument peculiar to his office, but on whether or not he was engaged in, or under the pretense of engaging in, his official duties. *United States v. Classic, supra* [state election officials engaged in election fraud]; *Screws v. United States, supra* [state police officials using unlawful force during an arrest]; *Williams v. United States*, 341 U.S. 97 (1951) [police special deputy coercing confessions during a criminal investigation]; *Griffin v. Maryland*, 378 U.S. 130 (1964) [special deputy sheriff wrongfully arresting and instituting criminal proceedings]. In *Griffin, supra*, this Court stated the basis for its determination that the actor had committed violations of constitutional significance was that he had purported to exercise his authority as deputy sheriff, notwithstanding his combined status as an employee of a private corporation. In 378 U.S., at page 135, the Court pointed out:

> "* * *. If an individual is possessed of state authority and purports to act under that authority his action is state action. * * *."

In applying these principles, lower Federal Courts have recognized that a person does not act "under color of law" simply because he is employed by the state. *Cole v. Smith*, 344 F. 2d 721 (8th Cir. 1965); *Byrne v. Kysar*, 347 F. 2d 734 (7th Cir. 1965); *Duzymski v. Nosal*, 324 F. 2d 924 (7th Cir. 1963). Nor does he so act purely by reason of his status as a police officer engaged in an assault as a matter of private conduct. *Nugent v. Sheppard*, 318 F. Supp. 314 (N.D. Ind. 1970); *Johnson v. Hackett*, 284 F. Supp. 933 (E.D. Pa. 1968); *Watkins v. Oakland Jockey Club*, 183 F.2d 440 (8th Cir. 1950). Rather, the proper focus must be upon the nature of the act performed and whether the officer had actually embarked upon the performance of his official duties. *Robinson v. Davis*, 447 F.2d 753 (4th Cir. 1971), *cert. denied*, 405 U.S. 979 (1972); *United States, ex rel., Smith v. Heil*, 308 F. Supp. 1063 (E.D. Pa. 1970); *Johnson v. Hackett, supra.*

Contrary to the principles set forth above, the Sixth Circuit and the District Court below, wrongly relied upon the fact that the Petitioner resorted to the use of a weapon which he carried pursuant to police regulations, to raise the inference that the weapon was used under color of law. [Petition for Writ of Certiorari, p. 25.] Also, the District Court included such inference in its charge to the jury. [A. 210] To permit the use of such a weapon to alone raise the inference of official action would truly eliminate any possibility of its use in private conduct and would irretrievably extend the scope of 42 U.S.C. §1983 beyond its intended application. In *Screws v. United States, supra*, this Court did not infer the defendants' conduct to be under color of law because they were police officers who used

a blackjack, but rather because they used the blackjack in the performance of their official duties. In its opinion this Court stated in 325 U.S. at pages 108 and 109:

> "* * * . We are of the view that petitioners acted under 'color' of law in making the arrest of Robert Hall and in assaulting him. They were officers of the law who made the arrest. By their own admissions they assaulted Hall in order to protect themselves and to keep their prisoner from escaping. It was their duty under Georgia law to make the arrest effective. Hence, their conduct comes within the statute. * * * ."

Unlike the situation in *Screws, supra*, the Complaint in the instant case specifically alleges that the Petitioner was off-duty, out of uniform, did not personally attempt to arrest anyone either as a police officer or as a private citizen, and at no time did he notify or attempt to notify anyone that he was an off-duty police officer. [A. 10-11] The Complaint merely alleges aggressive involvement in an altercation.

The Petitioner did not contend in his Motion to Dismiss [A. 24-28], as suggested by the District Court in its Order overruling the motion [A. 31], that he was not under color of law because of his off-duty status, but rather that the proper inference to be derived from the facts pleaded was that the Petitioner did not act as a police officer or under the "pretense" of law.

A careful examination of the evidence at trial from those who witnessed the incident (including the Petitioner and the Respondent, Stengel) produced nothing which would indicate that the Petitioner had, at anytime, embarked upon the exercise of his official duties. As was alleged in the Complaint, the witnesses did not

dispute that the Petitioner was off-duty and engaged in private social activity. It was further undisputed that he did not attempt to personally make an arrest or identify himself as a police officer; nor did the Respondents' decedents or the Respondent understand him to be a police officer. The contrast in facts between Respondent Stengel's testimony from that of the other witnesses is that Stengel merely portrays the Petitioner as an aggressor. Involvement in an altercation, even where the person is a police officer and an aggressor, does not alone raise the inference of action under color of law. *Screws v. United States*, 325 U.S. 91, 108, 109 (1945); *Johnson v. Hackett*, 284 F. Supp. 933 (E.D. Pa. 1968); *Smith v. Heil*, 308 F. Supp. 1063 (E.D. Pa. 1970). Furthermore, the Petitioner's stated intention was to proceed to a telephone in order to call the police which is no more than the expected act of any private citizen under the circumstances.

In its Opinion [Petition for Writ of Certiorari, page 26], the Sixth Circuit commented that the Petitioner used poor judgment in failing to identify himself as a police officer which that Court believed would have easily solved matters. The Petitioner suggests that the more logical inference to be drawn from such a failure is the fact that the Petitioner did indeed not intend to act as a police officer, but rather as a private citizen. In any event, where there is an absence of evidence to indicate that the Petitioner had engaged in, or attempted to engage in, the performance of his official duties, to find his involvement in an altercation to be activity under color of law is contrary to the stated principles governing 42 U.S.C. §1983.

In addition to its focus upon the weapon used, it is clear from the Opinion of the Sixth Circuit that it placed considerable reliance upon the opinions of cer-

tain City officials who had not witnessed the incident but offered their later developed beliefs that the Petitioner had acted in the line of duty and was covered by the Workmen's Compensation Law of the State of Ohio. [Petition for Writ of Certiorari, page 25] It is Petitioner's contention that the lower Courts wrongly relied upon such evidence which was offered during the Plaintiffs' case in chief, where Defendant supervisors were questioned in order to establish Respondents' claims of conspiracy in regard to the Defendants' administrative actions. Moreover, any opinions so offered were based upon the statements as given by the eye-witnesses to the incident and thus, upon the same facts as recited above in regard to the nature of the Petitioner's involvement. The question of whether the Petitioner acted under color of law is a question of law for the determination of the Federal Court based upon a careful examination of the manner and character of his actions at the time and place of the event. *Robinson v. Davis*, 447 F.2d 753 (4th Cir. 1971), *cert. denied*, 405 U.S. 979 (1972). Opinions offered by persons who did not witness Petitioner's actions are not relevant to the determination of the federal issue in question and should not be permitted to displace a Federal Court's judgment as to that jurisdictional issue. To allow such displacement would stray from the judicial requirement of a "careful sifting of the facts and circumstances of each particular case." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

Although the Petitioner contends that the decisions of the District Court and the Sixth Circuit below conflict with the past interpretations given by this Court in its considerations of the phrase "under color of

law," a clear definition of those words has yet to be established. In *Monroe v. Pape*, 365 U.S. 167 (1961); *Screws v. United States*, 325 U.S. 91 (1945); and *United States v. Classic*, 313 U.S. 299 (1941), this Court was not confronted with allegations of such a tenuous attachment to official action as suggested here by the mere existence and use of a weapon authorized by the actor's office. Rather, those cases involved situations where the defendants had clearly embarked upon the pursuit of their official duties and, while performing those duties, committed wrongful and unauthorized acts.

Although as recognized in *Monroe v. Pape*, *supra*, the words "under color of" law or state authority may not lend themselves to precision in the law, the danger of a continuing uncertainty in the application of that phrase is evidenced by the opinions of the District Court and Sixth Circuit in the instant case which broaden the scope of 42 U.S.C. §1983 and create implications for its unwarranted extension. To focus merely upon the official nature of the weapon used to alone raise the inference that it was used "under color of law" or other authority would easily extend the statute's application to encompass any accidental discharge of the weapon by an off-duty officer or even its use in purely criminal conduct which sets in total opposition to the user's authority or duty. Such an interpretation would virtually emasculate the well recognized exclusion of private conduct set forth in *The Civil Rights Cases*, 109 U.S. 3 (1883) from within the ambit of the Act.

The same concerns are apparent in view of the lower Court's treatment of the nature of this Petitioner's actions. Whether one accepts the version that Belcher

was involved in the incident as an aggressor or as a matter of self-defense, the essential ingredient of official action does not surface. Even accepting Belcher as an aggressor, it is difficult to find a meaningful distinction between his involvement and that of the witness, Kyle Morgan. [A. 142] Both were engaged in private social activity and both involved themselves in the altercation. The actual difference upon which the District Court and the Sixth Circuit seem to have relied in order to hold Belcher subject to a federal cause of action is that, when working, Belcher was employed as a police officer. Even where a Columbus police officer is subject to a requirement that he take action twenty-four hours a day when confronted with a criminal situation, that does not lead to the conclusion, nor is it mandated by the requirement, that every act taken which could be said to comply therewith, would consist of an action "under color of law." The requirement could be met by purely private action. Under the impact of the lower Courts' rulings, acts of a private nature, not necessarily peculiar to the duties of a police officer, are swept into the realm of constitutional significance because the actor is employed as a police officer. Calling police for assistance or reacting to a situation in self-defense, would be construed automatically as acts under color of law. Such interpretations could not meaningfully be distinguished from a police officer's disciplining his own children's wrongful acts at home, or negligently injuring a person while driving a police cruiser home from work under departmental regulations. Such a view would seem to hold that once a person is sworn in as a police officer, his existence as a private citizen is terminated.

The affect of such an application of 42 U.S.C. §1983 as has occurred in this case is to blur the concept of "private" as opposed to "public" action, or "pretense" of public action, to an irretrievable point. As expressed in *The Civil Rights Cases*, 109 U.S. 3 (1883), the Act was not intended to become the foundation of a general federal tort remedy to accompany State law. This is particularly significant in view of the extensive proliferation of cases brought to the Federal Courts for determination under 42 U.S.C. §1983 and related sections, and the consequent burden thus placed upon the Federal judiciary.

Such considerations are no less important to the administration of local law enforcement. The regulations dictating that officers carry weapons while off-duty have valid and essential purposes. They provide a means whereby the officer may take police action twenty-four hours a day and a capability of instant response where emergencies require supervisors to call the off-duty personnel to an on-duty status. Also, they assure individual officers a manner of self-defense against individuals who may wish them harm by reason of the special nature of their employment. Proper law enforcement by honest and conscientious law officers is vital to the cities of this nation which are experiencing a continual rise in crime. Certainly the impact of the lower Courts' rulings here will tend to stultify proper law enforcement and lessen a measure of protection for citizens as well as for the individual officer. This Court has recognized as a matter of public policy that federal courts should not act so as to dampen vigorous law enforcement or create a hesitancy upon the individual officer to take action. Such a policy should also apply to allow officers the freedom of self-defense in the carrying on of their private lives.

Had the Sixth Circuit and the District Court below reviewed the properly relevant evidence and allegations pertaining to the federal question presented under 42 U.S.C. §1983, using the stated principles set forth by this Court and lower Federal Courts, they would have been compelled to determine that the Petitioner had not acted under color of law.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the judgment of the District Court, as affirmed by the Sixth Circuit, should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-823

RAYMOND BELCHER,
Petitioner,

v.

CASEY D. STENGEL, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

Pursuant to Rule 40 of the Rules of the Supreme Court, Respondents state that they are dissatisfied with the statement of the case presented by Petitioner because it is not accurately expressed in the terms and circumstances of this case for at least three reasons:

1. The alleged question inaccurately assumes that the sole basis for the trial court's decision and verdict, and the appellate court's affirmance is the regulation requiring police officers to carry guns at all practical times.

2. The alleged question inaccurately assumes that the trial court's decisions and verdict, and the appellate court affirmance make a determination that any use of a gun that an officer was required to carry at all practical times was necessarily an act "under color of law".

3. The alleged question inaccurately assumes that the defendant officer was engaged in private conduct which is contrary to a finding of fact implicit in the jury verdict under the

charge of the District Court, and which is also contrary to the weight of the evidence and the Sixth Court opinion.

The reasons just given will be discussed in more detail in the argument section of the brief.

Respondents believe that the question thus inaccurately stated does, perhaps, include some subsidiary questions which are fairly comprised in an accurate statement of this record which the court might care to consider on the whole record in lieu of a possible finding that the writ of certiorari was improvidently granted.

Based on a complete and accurate review of the lower courts' proceedings, the following could be considered by this court as subsidiary questions pursuant to Court Rule 40 1(d).

1. Testimony and conclusions by a city police chief and a city safety director given after complete review of every investigative report prepared following a shooting incident, to the effect that at all times the officer involved acted in the line of duty when two men were killed, and one shot in the back and

paralyzed for life, from shots at close range from the officer's gun is sufficient evidence for a court to determine as a matter of law that the officer was "acting under color of law" or at least sufficient evidence to require submission of the color of law issue to a jury.

2. The filing of a claim for and the receipt of workmen's compensation by a police officer for activities on the ground that he was "in line of duty under circumstances relating to police dyties" in which this police officer shot at close range and killed two men and shot another in the back who became paralyzed for life using a gun he was required to carry at all practical times pursuant to city police regulations is sufficient evidence for a court to determine as a matter of law that the officer was "acting under color of law" or at least provided sufficient evidence to require submission of the "color of law issue" to a jury.

3. The fact that petitioner police officer was represented throughout the trial and appeal by a city attorney whose authority was derived from a city charter provision describing his powers and duties to "be the legal adviser of and attorney and counsel for the city, and for

all officers and departments thereof in matters relating to their official duties" was a significant circumstance that the District Court and Appellate Court could consider regarding the issue of "color of law", which such defense counsel presented intermittently as a defense from the pleading stage through the appellate proceedings.

4. The fact that a police officer shooting at very close range killed two men and permanently paralyzed a third by a shot in the back with a gun he was required to carry at all practical times pursuant to police regulations, did not identify himself as a police officer or actually make a formal arrest, does not establish that he was not acting "under color of law" where there was substantial evidence that he commenced to quell a disturbance among other patrons who were strangers to him and unarmed in a public cafe using chemical mace issued to him by the city police department, where the officer admitted he had in mind the arrest of at least two men -(App. 173), and that he intended to stop the disturbance among strangers with the mace -(App. 185-187), which officer chased one victim outside the front door of the cafe and slugged him in the face with the gun

-(App. 176), particularly where a police regulation of the city required officers technically off duty to take action in any police or criminal activity twenty-four hours per day -(App. 76-77).

5. Where all causes of action in a complaint were tried together without objection opinions of a police chief and a safety director given after review of all investigative reports and statement of the participating officer to the effect that the officer acted in line of duty during the incident related to all claims in the complaint arising from the incident.

6. Where a vast volume of evidence in exhibits, examination and cross-examination of witnesses, opinion of a police chief and city safety director given after a review of all investigative reports and statements established action in "line of duty" in an incident were admitted without objection, and the police officer's counsel further agreed in open court that the police officer was acting under color of law -(App. 199), and argued the same conclusion to a jury -(Record 741 and 742), the police officer will not, thereafter, following

an unfavorable jury verdict, be allowed to object to the jury verdict on the ground that it implicitly determined he was acting "under color of law".

STATEMENT OF THE CASE

In the United States Court of Appeals for the Sixth Circuit, appellees who are respondents here presented a statement of the case which was divided into three parts as follows:

1. Simple Framework of Undisputed Facts
2. Stengel's Version of the Case
3. Inaccuracies in Appellant's Statement of The Case (13 listed)

In that court Belcher's counsel did not even file a reply brief or, thereafter, dispute appellees' statement or the listing of inaccuracies in Belcher's statement of the case. The Sixth Circuit, thereafter, in its opinion accepted the facts essentially as stated by appellees there who are respondents here.

In this Court petitioner has again presented an inaccurate, distorted version, although the inaccuracies and omissions here are somewhat different and, perhaps, more devious.

Therefore, respondents' statement of the case here will repeat exactly what was used in the Appellate Court in the first two sections with references to the appendix rather than the trial record where possible. Next, respondents will list the new inaccuracies, distortions and omissions in petitioner's statement of the case in this court.

SIMPLE FRAMEWORK OF UNDISPUTED FACTS

1. Plaintiff Stengel and two plaintiff decedents entered a neighborhood tavern in the outskirts of the Ohio State University area at about one a.m. in the morning on March 1, 1971; and Stengel and one of his companions began playing a bowling game on the premises with Mr. and Mrs. Kyle Morgan who had been in the tavern continuously from about 3:00 p.m., February 28, 1971.

2. Within about one-half hour, appellant, Raymond L. Belcher, an off duty, married, out-of-uniform Columbus policeman arrived at the tavern with a girlfriend. Belcher and his girlfriend sat with the barmaid of the establishment and her husband, Mr. and Mrs. Comston, in the second booth from the front door. Belcher had one drink of hard liquor and started on the second. Belcher was carrying a gun pursuant to City of Columbus police regulations. See pre-trial stipulation of uncontroverted facts No. 2.

3. Joint Exhibit 78 is an agreed scale drawing of the tavern and shows the tavern

room to have an interior width of 16 feet 10 inches and a depth of 54 feet 6 inches, and the exhibit discloses that the bowling machine area was approximately 20 to 25 feet from the westerly side of the booth where Belcher was sitting.

4. An argument developed between Noe and Mrs. Morgan about whether the loser would buy beer or hard liquor and Mrs. Morgan slapped or slapped at Noe. This minor happening quickly developed into the tragedy which is now before the Court. Except for Stengel's version which has always been consistent, there is little testimony of any witnesses that is not controverted in whole or in part by some other witness or by the same witness telling different stories different times about the developments, but there are a few basic facts and results that are not controverted as follows:

5. Plaintiff, Stengel, and plaintiff decedents were not armed, used no weapons and none were found on them, although there is conflicting evidence about them stomping and kicking with their feet.

6. Defendant, Raymond L. Belcher, used a chemical mace issued to him by the Columbus Police Department and quickly thereafter shot Ruff in the chest, into the heart, from a distance of 12 to 20 inches, shot Stengel in the back from a distance of 6 to 10 inches, and shot Noe in the chest and through the heart from a distance of 6 inches. The shots were from a weapon which Belcher was required to carry when off duty by regulation of the Columbus Police Department; and the distances just mentioned were determined by ballistic tests of the gun using the clothing of the

persons shot. These were Columbus Police Department tests.

7. The shooting resulted in the deaths of Robert D. Ruff and Michael J. D. Noe and permanent injuries to plaintiff Casey D. Stengel. (Pre-trial signed stipulation of uncontroverted facts No. 4.)

8. There is no evidence that Belcher ever identified himself as a Columbus Police officer. Bonnie Lohman, Belcher's girlfriend, testified:

"He got up with the tear gas and went to spray Noe." -(App. 127) The tear gas used was issued to Belcher by the Columbus Police Department. (App. 177) Belcher testified that after shooting inside the tavern he chased Noe out the front door to keep him from getting away, and that he struggled violently with Noe and slugged him in the face with his gun. (App. 188)

9. The first officer on the scene after the shooting testified that Belcher:

"appeared to have been hassled -- his face was red." (R. 295)

10. Twenty or thirty minutes after the incident Belcher was taken to a hospital, x-rayed and examined and released in good condition in about an hour. Other than the three men who were shot and Belcher, nobody in the tavern received any medical attention following the incident.

11. Microscopic examination of the shoes of the three men who were shot showed no traces of blood or hair, except Noe's shoes,

which showed traces of blood of a type the same as Stengel's, and he passed by the area of Stengel's body after Stengel had been shot and was lying on the floor. This blood was also Noe's own blood type. Noe was fatally shot and his body was found on the sidewalk outside -- fourteen feet from the exit. Belcher, also, had the same blood type.

12. Joint Exhibits 24 and 42 pages A through J are Belcher's Workmen's Compensation information and establish that Columbus recognized the claim as one in the course of employment, by the following language:

> "Although this officer was 'off duty' he was in line of duty under circumstances relating to police duties."

These joint exhibits also show under Belcher's signature only a claim for bruises, abras-ons and contusions on chest, face, and neck a day or two after the incident. This Court should note that more than a year later after this suit was filed a claim for back trouble from the incident appears for the first time. Also, the testimony of Police Chief Joseph admits that Belcher acted under authority of police regulations requiring him to carry a gun and take action in any type of police or criminal activity in connection with any disturbance. -(App. 76 and 77)

STENGEL'S VERSION OF THE CASE

1. Appellee, Casey Stengel, testified at length regarding the facts of the incident. His testimony is clear, sensible, consistent with the physical facts and not shaken to any degree by cross-examination about the

incident. (App. 62-63) It would appear from the result that these are substantially the facts that the jury accepted rather than the mass of contradictions and exaggerations of the defense witnesses which in many instances simply don't make sense. A summary of Stengel's testimony as shown in App. 44 through 49, is that he was sitting at the bar and had been talking to his Uncle Robert Ruff. He heard the disturbance behind him and as he turned, he saw that his uncle, who in the meantime had gotten up, was restraining Agnes Morgan against the piano. He saw a stranger, later determined to be Raymond Belcher, who was jumping on his uncle from the rear. Momentarily, before or as he was turning, Stengel detected a faint odor of chemical mace already in the small tavern.

2. At this point Stengel separated the stranger who had attacked his uncle from the rear and pulled him down to the floor during which time the stranger began spraying chemical mace directly at him. With the stranger on the floor with his hand extended up in the air spraying chemical mace, Stengel kicked at the hand a couple of times and the discharge from the mace stopped. Next, Stengel was aware that his uncle was standing over the stranger who had intervened in the disturbance. As he turned around to see what was happening back at the piano and bowling machine area, he heard two shots, the second of which entered the right side of his back above the belt and hit his spine causing immediate paralysis below the point where the bullet hit the spine.

3. The sum of Stengel's testimony is that he only tried to separate the parties already involved in the disturbance, defend his

uncle, Robert Ruff, and protect himself from chemical mace which was being discharged directly at his face from close range. He, also, described Belcher as jumping up immediately after the shooting and chasing somebody out the front door.

4. Stengel's testimony is consistent with the physical findings and scientific tests, and the fact of no serious or consequential injuries to Belcher. It is, also, consistent with common sense as there is absolutely no evidence from anybody that would give Stengel any motive, means, opportunity, or desire to assault Belcher with intent to kill. This was the preposterous charge filed against Stengel within a few hours and at a time when he was still having the bullet removed from his back or recovering therefrom in a recovery room.

INACCURACIES OF PETITIONER'S STATEMENT OF THE CASE IN THE SUPREME COURT OF UNITED STATES

1. On page three in the last paragraph and on the top of page 4 of his brief petitioner omits mentioning the following specific allegations in the complaint:

"During all times herein mentioned the City of Columbus by police regulation ordered off-duty policemen to carry arms at all times based on the theory that the police officers and police chief are on duty 24 hours per day.

"During all times mentioned herein defendants Belcher -... were duly appointed, qualified and acting police officers...and were agents of said city acting or purporting to act in the course of their employment, and engaged or purported to be engaged in the performance of their duties as police officers...and acting pursuant to orders, directives and regulations of said Police Department and orders and directives from defendant, Dwight Joseph, Police Chief of the City of Columbus...."

"All the conduct of all the defendants in connection with the facts alleged in this complaint has been ratified and condoned by defendant, The City of Columbus, through acts and conduct of its Chief of Police, Dwight Joseph, and other duly authorized supervisory personnel."

2. In the second paragraph on page 6 of his brief petitioner states there is no dispute that no time did Belcher attempt to personally effect an arrest, either as a police officer or as a private citizen.

The complaint does not allege such attempt, but evidence did develop at trial to that effect.

At App. 173 Belcher testified:

"At that point I realized that I could not let this scene continue any longer, and I made up my mind that I was absolutely one way or another going to arrest all three men -- correction, at least two men. Mr. Stengel at

this point hadn't gotten involved in anything at all."

At App. 187 Belcher admitted to the following statement made at preliminary hearing:

> "At that time I stood up, attempted to spray Michael Noe with chemical mace that I had. The tear gas didn't seem to work very much. Instead of coming out in a liquid stream, it came out in a gas and just generally sprayed everybody there. That is all the action I got into. All I wanted to do was stop the fight at that point."

At App. 176 - Belcher testified:

> "Two men fell to the floor, one man the young man I know as Michael Noe, ran out the door. I got onto my feet and chased Mr. Noe outside. I did catch up with him. We struggled. Mr. Noe was struggling violently with me as if to escape. I struck Mr. Noe with the pistol across the face."

3. On page 6 of his brief petitioner's statement is that he decided to call the police which necessitated leaving the bar and proceeding to a telephone booth on the sidewalk outside. This conflicts directly with the statement at App. 187 just given which discrepancies petitioner does not take into account in his statement of the case.

4. On page 6 of his brief petitioner does

not take into account conflicts in testimony when he states -

> "as he arose from his seat he told Bonnie Lohman to leave the premises should more trouble occur."

As shown at (App. 154) witness Comston sitting in the same booth did not hear anything said by Belcher to his girlfriend at that time. Yet, Lohman - Belcher's twenty year old girlfriend - claims -(App. 121) that Ray -

> "said something about calling the police, and me to get the hell out of there" -

This discrepancy is significant as it supports the version that Belcher intervened in the scuffle rather than attempted to go to make a 'phone call and raises questions as to how and why the girlfriend was the only witness who was not at the scene when other police arrived.

5. On page 7 of petitioner's brief it is stated:

> "Once the gas was emitting Belcher did indicate an intent to spray respondent Noe who was now coming toward him."

This statement does not take into account the testimony - App. 123 - when Bonnie Lohman testified:

Q. What happened next?
A. Noe stopped kicking Morgan and started in that direction. Stengel got shot.

Q. Started in the direction of Officer Belcher?
A. Yes.

Q. Then Stengel got shot?
A. Yes.

The foregoing omitted testimony is significant because it verifies Stengel's version that Noe was never an aggressor at anytime as far as Belcher was concerned prior to the shooting.

6. In petitioner's brief, page 8, at the first series of asterisks the following crucial admissions by Belcher are omitted which followed immediately after the language that ended at these first asterisks:

> "Two men fell to the floor, one man, the young man known as Mike Noe, ran out the door. I got onto my feet and chased Mr. Noe outside. I did catch up with him. We struggled. Mr. Noe was struggling violently with me as if to escape. I struck Mr. Noe with the pistol across the face."

7. On page 9 of the brief petitioner states:

> "Belcher's testimony of his involvement in the matter was corroborated by all other eye-witnesses with the exception of Stengel."

This statement fails to take into account the many inconsistencies of the testimony of witnesses with each other, although in a general way, there is partial corroboration of Belcher's testimony by some of the witnesses, and, particularly, it fails to take into account the direct conflict with Belcher's story shown by Joint Exhibit 26 - App. 242 - which is the initial statement given by witness, James Comston, a few hours after the incident. Comston was sitting in the booth facing east beside Belcher, and had the best ringside seat for the whole incident, and his statement, in part, includes the following -(App. 244):

"Q. Did you see anyone kick Ray? With their feet or stomp him. A. No, I didn't.

Q. Did you see a man with a red-polka dot shirt? A. Yes.

Q. Was this man attacking Ray? A. Yes, he was one of them.

Q. Just exactly how was he attacking him?
A. He, Ray, had one of the guys, the one in the polka-dot, he jumped Ray, on there to help his buddy out."

It should be noted that this ringside spectator in his first statement after the incident corroborated Stengel's version, although his testimony at trial was entirely different.

8. Near the bottom of page 9 of petitioner's

brief it is stated:

> "Stengel's description as to Belcher's involvement was in direct conflict with all other eye witnesses."

For the reasons shown in No. 7 just given, this is not true. In addition, there is much of Stengel's testimony which is not at all in conflict with Belcher's statement such as, the original slapping incident in which Stengel was not involved, the tear gas in Stengel's face, Belcher jumping up after firing the gun and chasing Noe out the front door, and numerous other details.

9. On page ten of petitioner's brief near the top of the page he states the opinion of the police chief and the safety director were admitted in evidence to establish a conspiracy. This is grossly inaccurate, as the various claims in the complaint were not tried separately, and the opinions were admitted without objection, and tended to prove activity under color of law as to all claims in the complaint, and had no special relationship to the conspiracy claim.

10. On page ten near the bottom of the first long paragraph, there is an inaccurate summary

of the Hughes' letter to Belcher when the summary of the letter is compared with the actual letter - joint Exhibit 43 - which exhibit states only Hughes' opinions. This discrepancy is only significant to the extent that the record does not actually disclose any separate opinion of the Firearms Board of Inquiry, within the Hughes' letter, and Hughes did not participate as a member of that Board of Inquiry.

11. At the bottom of page ten and the top of page eleven of petitioner's brief a portion of the Court's charge is pulled from context which has the misleading effect of de-emphasizing language in the charge which immediately precedes, and following the excerpts. The full context of the District Court's charge to the jury as it relates to the color of law issue is given in Appendix 207 through 216. Also, in connection with the charge petitioner fails to note that no exception was taken to the court's charge in any manner as it concerned the color of law issue.

CONCLUSION REGARDING STATEMENT OF THE CASE

Respondents believe petitioner has degraded

the United States Court of Appeals for the Sixth Circuit and The Supreme Court of the United States by statements summarizing this case which are inaccurate, incomplete and unfair. Respondents may have failed in their duty to this court by not opposing the petition for a writ of certiorari with a more detailed response, but it is believed that based on the details thus far outlined in this brief, this court now has additional information which more clearly explains why petitioner's alleged question presented is not truly within the evidence presented or is it related accurately to any rulings of law which were pronounced either in the District Court, or in the Sixth Circuit opinion.

FACTS MAKING THIS CASE UNUSUAL OR UNIQUE

Although respondents believe the actions of the District Court and the Sixth Circuit are well within the established and settled law announced by this court in U. S. v. Classic (1941), Screws v. U. S. (1943), Williams v. U. S. (1951), and Monroe v. Pape (1961), there are certain facts of this case which are unique or at least somewhat unusual in the annals of civil rights litigation in federal courts as

follows:

1. The vast majority of civil rights plaintiffs have been black or persons aiding black people in asserting their rights. The involvement here is with white Americans without any minority status or special status as prisoners or protesting students.

2. The two deaths and one terrible injury exceed by far the damages to any plaintiff or group of plaintiffs by the act of one person in any reported case.

3. Plaintiffs here were asserting no special constitutional right in connection with the incident such as free speech, freedom of assemblage, equal protection of the laws, etc.

4. The jury determination demonstrates a clear understanding of the measure of damages as to each plaintiff pursuant to the charge of the court, and the verdict implicitly determines by reason of the punitive damage finding that the shootings were malicious, wanton or oppressive. The charge of the court regarding punitive damages was correct, and no objections to the charge relative to punitive damages were made.

5. Principal trial counsel for the defendants was also himself a defendant, and an important witness called to testify on cross-examination by the plaintiffs by reason of his former position as city safety director at the time of the shooting incident, and his activities regarding this incident prior to the filing of

the civil rights case.

6. A grossly exaggerated criminal charge of assault with intent to kill was filed against Stengel who was unarmed within seven or eight hours after the shooting incident before the police investigation was completed or results of scientific tests by the crime laboratory were complete, and before opportunity for Stengel to give a statement, as he was in the hospital recovering from the removal of the bullet from his back when the charges were filed.

7. The exaggerated criminal charge against Stengel was not tried until almost two years after the incident, but the 1983 claim was filed one day before the one year statute of limitations covering assault claims in Ohio.

8. Defendants in the federal case opposed all discovery procedures for almost a year on the ground of necessity because of an ongoing criminal prosecution. The detective who prepared the county prosecutor's summary did not notify the prosecutor that two sets of statements were taken. Therefore, the crucial testimony of the closest witness which corroborates Stengel's version, as shown in the last part of Joint Exhibit 26 was unavailable in the criminal case. In the record page 281 Detective Ewell Young testified:

Q. "Did you tell the prosecutor that statements were taken earlier in the morning, and then they were taken again?"

A. "No sir, I did not."

9. The defense trial tactics and argument sought to influence the jury and the trial judge by admissions that the police officer acted in line of duty thus abandoning any reliance on a defense originally pled that the police officer was not acting "under color of law". After the trial judge, nevertheless, cautiously submitted the issue of "color of law" to the jury because of certain factual uncertainties in the evidence with a charge that was not objected to and implicit in the jury verdict, is a finding of action "under color of law", petitioner is trying to revive the issue in appellate proceedings on the theory that all the police officer's activity was private conduct.

A R G U M E N T

I THE REASONS WHY THE QUESTION PETITIONER SEEKS TO PRESENT IS INACCURATELY EXPRESSED IN THE TERMS AND CIRCUMSTANCES OF THIS CASE.

1. The results below are on a much broader base than the gun carrying regulation because of the following:

a. Petitioner used police issued chemical mace to attempt to quell a minor disturbance between unarmed strangers to him in a public tavern.

b. Under police regulations and custom, the

police officer was expected to take action in any kind of a breach of the peace, although not necessarily with the gun or any other particular weapon or method.

c. After the shooting of at least two men the officer wrestled with and tried to keep a third man from escaping.

d. The officer applied for and received workmen's compensation because he was "acting in line of duty" in the incident.

e. The police officer's two highest superiors, the police chief and the city safety director, reviewed all investigative reports, and the officers' statements, and found his action to be in line of duty without sole reliance on the gun carrying regulation.

f. There was substantial evidence from the parts of the officer's own statements that he intended to make arrests which was not solely related to the gun carrying regulation.

In summary for this subsection it can be stated that the gun carrying regulation is an important part of both the "color of law" evidence, and the use of excessive force which establishes the constitutional violation as well, but it is still a relatively small part of what the Sixth Circuit opinion described as overwhelming evidence.

2. There is nothing in this case that suggests or implies that "any use of the gun" the officer was required to carry at all practical times would be action "under color of law". The facts of this case are clearly not so broad as to encompass "any use of the gun," but merely relate to the facts and evidence in this record, and there is no statement any of the judges in the District Court or Appellate Court that justifies such an exaggerated and maudlin presentation to this court.

3. The evidence does not justify the assumption that the officer was engaged in "private conduct" in the incident because in addition to the points listed a through f under paragraph 1 preceeding, also -

a. Failure to identify himself as a police officer did not necessarily make the conduct private, but rather as the Circuit Court opinion stated -

> "as a police officer he used poor judgment in this regard."

b. The interaction occurred in a public tavern between strangers.

c. There is a finding of fact implicit in the jury verdict after the charge of the court that petitioner was not engaged in

private conduct -(App. 209 - 210 - Portions of court's charge)

d. The points listed under paragraph 1 - a. through f. preceding and a through c immediately above - support the Sixth Circuit's statement near the end of the opinion as follows:

> "concerning liability the verdict is supported by overwhelming evidence."

At that point the Sixth Circuit opinion was discussing the whole record, including the weakness of the self defense argument and the justification of the award of punitive damages.

II THE DETERMINATIONS BY THE SIXTH CIRCUIT AND THE DISTRICT COURT THAT PETITIONER HAD ACTED UNDER COLOR OF LAW DO NOT, IN FACT, CONFLICT IN PRINCIPLE WITH ANY DECISIONS OF THE SUPREME COURT AND LOWER FEDERAL COURTS

Initially, petitioners have omitted vital parts of the Complaint in attacking the pleadings with a Motion to Dismiss. Further, in this court they have failed to discuss what the record in full discloses. On May 23rd, 1972 after James J. Hughes, Jr. had become City Attorney for Columbus, and before Motion to Dismiss the Complaint was filed, depositions in this case were taken of both Stengel and Petitioner Belcher. Belcher's deposition admitted that he had

applied for for and received Workmen's Compensation out of the incident involved, and also used words such as "apprehend" in relation to chasing Noe out the front door, and other indicia that he was acting in line of duty. Based on this deposition, and before a court ruling on the Motion to Dismiss respondents filed a Motion for Partial Summary judgment asking the District Court to determine as a matter of law that Belcher was acting under color of law.

This was the posture of the case at the pleading stage. Sometime thereafter, and simultaneously the court overruled City's Motion to Dismiss, and, likewise, overruled the Motion for Partial Summary Judgment leaving more detailed facts for development in the course of trial.

In view of all the allegations in the Complaint, many of which petitioner has, apparently, deliberately omitted in order to sift out and emphasize other statements of the occurrence from the Complaint, the trial court clearly followed settled law in overruling the Motion to Dismiss.

Likewise, the trial court very cautiously declined to charge the jury that the actions

were as a matter of law under color of law, apparently, because some of the facts in the occurrence were disputed, which facts the jury would resolve.

The Appellate Court, in view of statements of counsel and the record, stated that it agreed with respondent's position at the end of the evidence, that the trial court could have determined as a matter of law that petitioner was acting under color of law, but, specifically withheld any criticism of the more cautious approach of the District Court.

These rulings fit together logically when one considers that the Appellate Court had the opportunity for an overview of the final trial tactics of petitioner, including the argument to the jury by counsel emphasizing Belcher's activities and duties as a police officer.

The basic facts of this case are shocking, and the amount of the verdict is startling because of two deaths and one terrible maiming. A verdict of $831,000 far exceeds anything on record in any federal civil rights case which we found reported in this court or any lower federal court. The Sixth Circuit opinion properly

stated: "the verdict is supported by overwhelming evidence". The extent of damages in this case does not, however, cause conflicts with settled legal decisions of this court.

Also, the unusual fact that the police officer was out of uniform and not within his regular tour of duty, does not cause a conflict with other decisions when the full facts and circumstances of the incident are carefully taken into account.

Petitioner has made some broad emotional claims about this case broadening the application of the statute and creating implications for its unwarranted extension, but he has not backed this claim with any logical or accurate or specific reasoning.

It is respectfully urged that on the full facts here the actions by the lower courts are well within the facts, logic and reasoning of the leading cases - United States v. Classic, 313 U.S. 299 (1941), Screws v. United States, 325 U.S. 91 (1945); Williams v. United States, 341 U.S. 97 (1951), and Monroe v. Pape, 365 U.S. 167 (1961); Griffin v. Maryland, 378 U.S. 130 (1964).

In the case before the court the jury weighed the evidence and the disputed facts and returned a verdict that indicated the careful charge of the court was fully understood, as the awards to each plaintiff were consistent with the evidence and the charge. Further, the jury made an award of punitive damages in an equal amount to each plaintiff, which finding pursuant to the evidence and the court's charge, implicitedly means that the shootings were - "maliciously, or wantonly or oppressively done". (Charge of Court - 778 Record)

Concerning this determination, the Sixth Circuit opinion stated with precise reference to the evidence:

> "Concerning liability, the verdict is supported by the overwhelming evidence. The minor injuries consisting of bruises and cuts received by Belcher on his face which did not require hospitalization do not support his claim of self defense or justify his use of excessive force in killing two young men and permanently maiming a third. Concerning punitive damages, plaintiffs' counsel moved orally to amend the complaint to ask for punitive damages. Fed. R. Civ. Pro. 15(b). As with other issues which Belcher has raised, he did not object to the Court's instruction concerning punitive damages. Our observations concerning this

> failure, supra., are likewise applicable here. Stengel's testimony, in conjunction with the fact that the bullets were fired from close range without warning into vital parts of the victims' bodies, supports the award of punitive damages."[4]

4 - Footnote:

Punitive damages may be recovered in actions under 42 U.S.C. Sec. 1983. McDaniel v. Carroll, 457 F. 2d 568 (6th Cir. 1972), cert. denied, 409 U.S. 1106, 93 S. Ct. 897, 34 L Ed 2d 687 (1973); Basista v. Weir, 340 F. 2d, 74, 87 (3rd Cir. 1965).

In the opinion of the Court in Monroe v. Pape, 365 U. S. 167, at pages 184 and 185 a principle is stated that is clearly and particularly applicable to this case because the petitioner here is not able to specifically identify the claimed exigencies by reference to accurate facts or logical or sensible conclusions from the accurate facts.

> "The construction given Sec. 20 (18 U.S.C. Sec. 242) in the Classic case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have here a situation comparable to Mahnich v. Southern S. S. Co., 321 U. S. 96, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what

preceded and what followed. The Classic case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent re-examination. The meaning which the Classic case gave to the phrase "under color of any law" involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of Sec. 20 (18 U. S. C. Sec. 242) to meet the exigencies of each case coming before us." Id., 112-113.

We adhered to that view in Williams v. United States, supra, 99."

III PETITIONER'S ARGUMENT FOR ACTION BY THIS COURT IS UNSOUND.

Respondents note that many of petitioner's arguments are based on the false and inaccurate premises from his statement of the case.

For example, on page 18 petitioner states:

"A careful examination of the evidence at trial from those who witnessed the incident (including the petitioner and Respondent Stengel) produced nothing that would indicate

that petitioner had embarked upon the exercise of his official duties."

This statement ignores, statements by Belcher about intent to arrest at least two, Belcher chasing Noe out the door to stop his escape as verified by Stengel, and also the prior statement by Bonnie Lohman that Belcher took out his mace and "went to spray Noe."

Also, the second full paragraph of the argument on page 18 petitioner argues that the complaint "merely alleges aggressive involvement in an argument" which as shown earlier is false.

Another example of arguments on false premise is on page 20 of petitioner's arguments when they state:

"Opinions offered by persons who did not witness Petitioner's actions are not relevant to the determination of the federal issue in question and should not be permitted to displace a Federal Court's judgment as to that jurisdictional issue. To allow such displacement would stray from the judicial requirement of a 'careful sifting of the facts and circumstances of each particular case.' Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961)."

Although respondents believe that state

involvement here is so obvious from the full record that the requirement set up in the Burton case about sifting the facts does not really come into play, respondents are sure that the judicial requirement of a "careful sifting of the facts and circumstances of each particular case" was not intended to mean what petitioner has done here by sifting out all the facts that are damaging to his position, and then twisting the interpretation of the remainder of the facts.

It is respectfully urged that the disputed facts have been resolved by a jury under a proper charge by the court, and petitioner is now engaged in sifting out from this court's attention many of the facts which sustain the jury verdict. The facts here are detailed and the distinctions between the versions are somewhat subtle, making 100% accurate reporting all the facts difficult, but there is still no justification for the extent of inaccuracy and distortion in petitioner's presentation which degrades the federal courts in what should be a "search for truth".

It is regrettable that such a lengthy statement of the case and such lengthy refer-

ences to factual inaccuracies seem to be required, and respondents will not attempt to cover each and every one as they feel many will be obvious to the court without re-reference to them in our argument.

In addition, regardless of the inaccuracy of the basis of these arguments, respondents have great difficulty following their logic.

On page nineteen of their brief petitioner dwells on an isolated statement in the Sixth Circuit opinion that the officer used poor judgment in not initially identifying himself as a police officer. This statement is not a conclusion that there was not a great deal more than poor judgment involved in the ultimate shooting, as the appellate court affirmatively commented later that the punitive damages awards were amply justified.

On page twenty-two petitioner seems to say that action taken pursuant to a duty under police regulations could be private action, and not under "color of law", but that the lower court actions make every act of self defense, disciplining the officer's children, driving a police cruiser home from work, etc., actions

under color of law, and that, therefore, as soon as a policeman is sworn in, his existence as a private citizen ends. Next, after these drastic and definite conclusions about the impact of the lower court's rulings, they say that the difference between private and public action is "blurred" by the lower court's rulings to an irretrievable point.

Finally, on page twenty-three of his brief petitioner seems to reach new heights of irrelevance and inconsistency by talking about tort remedies, burden on the judiciary, that the lower court rulings will tend to discourage, proper law enforcement, lessen protection for citizens, dampen vigorous law enforcement, or create a hesitancy to act and deprive the officers of a right to self defense in their private lives.

Petitioner does not explain exactly "how" the lower court rulings are going to produce all these consequences, but if the lower court rulings are so far reaching, the consequences would seem to be both good and bad.

Without intending to be flippant, but just to illustrate the argument if lower court's ruling are as potent as claimed, perhaps police

officers will be reminded not to discipline their children by shooting, will be reminded that at least when they use the gun they are required to carry, they may have the responsibilities of police officers, and, perhaps, they should hesitate before using it.

As near as respondents can follow petitioner's line of argument, he seems to be saying that, out-of-uniform, off their regular tour of duty, policemen should be given some sort of special exemption or immunity from the impact of 1983, or they will likely go on some sort of slow-down or strike.

Respondents see some different impacts caused by the rulings of the lower courts. Respondents do not read the recent decisions of this court such as Rizzo v. Goode - 1976, Hicks v. Miranda, 422 U.S. 332, 1975, Imbler v. Palchlman - 1976, and Paul v. Davis - 1976, as even a one inch retreat from the basic principles established in U. S. v. Classic, Screws v. U. S., Williams v. United States, and Monroe v. Pape.

Respondents read the most recent decisions of the court in this general area to suggest -(1.) a limitation of District Court action in

activities which would engulf the court in detailed supervision of the daily functions of a police department, Rizzo v. Goode, 1976, and, (2.) a limitation on the use of District Courts for damage actions where the injuries claimed are not clearly violation of rights protected by the Federal Constitution, Paul, Chief of Police v. Davis, 1976.

However, in view of the denial of complete immunity to the Governor of a State in Scheuer v. Rhodes, it seems unlikely that this court's decisions suggest some sort of a special immunity from the impact of 1983 for police who are out of uniform, which is the way respondents interpret petitioner's request here.

Respondents read the recent decisions of this court as an attempt to maintain the delicate balance between state and federal governments by strict interpretations of new fact situations regarding 1983, both in the "color of law" aspect, and the constitutional rights definition, but not a turnaround or reversal of settled law in this area.

Petitioner seems to be making a maudlin appeal to this court for relief based on what he

might have read about this court's trends in the newspapers rather than what the decisions seem to say after detailed study.

Again, without the intention of flippancy, respondents suggest that petitioner's brief exceeds his constitutional right of free speech, as he has marched a set of straw man inaccurate facts before this court alongside a series of straw man inaccurate, illogical arguments, and then lit a match and yelled "fire".

More formally stated, it is respectfully urged that much of petitioner's argument insofar as respondents can follow and understand, it appears to be a continuance of the "manufactured exaggerations and distortions" which have already been rejected by the jury, the trial judge, and the Sixth Circuit opinion.

The principal judgment here is in favor of a non-protesting, white war veteran, who after distinguished service, was ready to commence his education at Ohio State University when he was maimed for life by a wanton act by a policeman in connection with a minor breach of the peace which Stengel was trying to control. The two other young men whose lives were snuffed out

were ordinary young white citizens drinking beer on a week-end without intending to seriously harm anyone.

After full hearing before a jury and careful judicial scrutiny, the victims have won under Title 42, Section 1983, in two federal courts, and petitioner has advanced no legally sound or factually accurate reasons why the results should be disturbed.

Respondents felt that the writ of certiorari would not be granted, as the question petitioner advanced is not within the facts of the case, but in lieu of a subsequent determination that it was improvidently granted - the sub-questions listed in the first pages of our brief may have some importance as a possible method of reaffirming and explaining the settled law of Monroe v. Pape - which is fifteen years old.

The police forces of our cities should be again reminded that the U. S. Constitution is the supreme law of the land which will be enforced in federal courts where it is necessary. The whole record in this case discloses the continuing need for the doctrine established in Monroe v. Pape as described in Headnote 2:

"2. In enacting Sec. 1979, Congress intended to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. Pp. 174-187.

(a) The statutory words "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" do not exclude acts of an official or policeman who can show no authority under state law, custom or usage to do what he did, or even who violated the state constitution and laws. Pp. 172-187.

(b) One of the purposes of this legislation was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies. Pp. 174-180."

In conclusion, it is respectfully urged that the lower courts have carefully followed long standing principles which control the full facts of this case, and a jury has resolved disputed issues of fact pursuant to a careful, fair and complete charge by the trial judge.

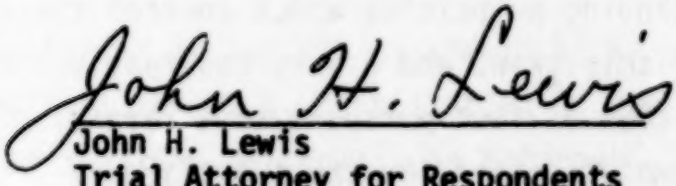
Petitioner's presentation here does violence to three long established principles and ideals of our court system which include: (1) "all

persons being equal in the eyes of the law"; (2) "a right to trial by a jury"; (3) Judicial proceeding should be a "search for truth".

CONCLUSION

Petitioner has presented a statement of the case which is an inexcusably inaccurate summary of the "manufactured exaggerations and distortions" presented as a defense in the lower courts. The jury verdict is supported by "overwhelming evidence" regarding the color of law issue and all other factual and legal issues. Petitioner has advanced no sound reason for changing the settled law that circumscribes the true facts of this case. All the actions by the lower courts should be affirmed.

Respectfully submitted,



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No. 75-823

In the Supreme Court of the United States

OCTOBER TERM, 1976

RAYMOND BEECHER, PETITIONER

v.

CASEY D. STENGEL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the evidence was sufficient to allow a jury to find, under instructions to which there was no objection, that the actions of an off-duty police officer were pursuant to his official duty and therefore "under color of law."

INTEREST OF THE UNITED STATES

An act under "color of law" wilfully depriving an individual of his constitutional rights is a felony,

in violation of 18 U.S.C. 242. Prosecutions for violations of Section 242 often charge public officials with unconstitutional action in carrying out their official duties. Although this case is a private action brought under 42 U.S.C. 1983, that statute, too, deals with actions taken "under color of law" depriving individuals of constitutional rights. Because the phrase "under color of law" is "accorded the same construction in both statutes," *Monroe* v. *Pape*, 365 U.S. 167, 185,[1] the Court's holding in this case would affect prosecutions under 18 U.S.C. 242.

STATEMENT

1. Petitioner is a police officer employed by the City of Columbus, Ohio (A. 166). On the night of March 1, 1971, while off duty, he was at a bar with his girlfriend and one other couple. Respondent Stengel, Robert D. Ruff and Michael J. D. Noe also were present.[2]

During the course of the evening, Noe and Ruff became involved in an altercation with other patrons (A. 45, 142, 172). As petitioner described events (A. 173), "Kyle Morgan, who was * * * too intoxicated to even defend himself, was being beaten and stomped by two men." Petitioner decided to intervene. He testified (*ibid.*):

[1] See also *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 152 n. 7, 166.

[2] The administrators of the estates of Ruff and Noe are respondents in this Court.

> At that point I realized that I could not let this scene continue any longer and I made up my mind that I was absolutely one way or the other going to arrest all three men—correction, at least two of these men.

It is not clear how petitioner accomplished his objective of becoming involved. Petitioner, whose version of events was corroborated by his girlfriend, testified that he attempted to reach an outdoor telephone to call other policemen and that, as he arose from his booth with his police-issue tear gas canister in hand (A. 177), he was attacked from behind by respondent Stengel (A. 111, 173-174). Respondent Stengel testified that petitioner accosted Ruff, and that he (Stengel) knocked petitioner down while trying to separate petitioner from Ruff (A. 45-46).

While petitioner was grappling with respondent Stengel on the floor of the bar, he shot Stengel, paralyzing him; he also shot and killed Ruff (A. 176). Petitioner testified that Noe then ran out the door of the bar (A. 176); that he "chased Mr. Noe outside"; and that during the ensuing struggle petitioner's gun went off, killing Noe (*ibid.*). Petitioner used his official side arm, which he and all other Columbus policemen were required to carry at all times (A. 218).

2. Respondents instituted this action on February 28, 1972. They alleged that petitioner acted under color of law to deprive them of their civil rights (A.

8-12, 17, 19).[3] Respondents requested a jury trial (A. 23). Trial began on June 10, 1974.

In addition to petitioner's statement that he intervened in the brawl to arrest the participants, the jury also received the following evidence tending to indicate that petitioner acted "under color of law":

a. Dwight Joseph, who was the Chief of Police at the time of this incident, testified that the rule requiring off-duty police officers to carry their weapons at all times was based on the fact that Columbus police officers were "expected to take action in any type of police or criminal activity 24 hours a day" (A. 76). Joseph stated that officers "would be subject to discipline if they didn't take action" (*ibid.*). In his opinion, petitioner's actions were taken pursuant to this regulation (A. 77).

b. Petitioner received workmen's compensation benefits for the injuries he incurred during the altercation (A. 224-241). Petitioner applied for these benefits on a form that required him to aver that he was seeking "compensation for injuries sustained in the course of my employment" (A. 225). The Chief of Police signed and approved the report of these injuries (A. 78, 241), and the Safety Coordinator

[3] Respondents also sued several city officials, alleging that the officials participated in a conspiracy to suppress the facts of this incident and to harass respondent Stengel; the complaint alleged that this action violated 42 U.S.C. 1985 (A. 8-9, 14-17, 18, 20). The claims against these defendants were dismissed by the court at the close of respondents' case (A. 198-206).

of the City Department of Industrial Relations certified "that this is a valid claim" (A. 227). The claim was approved by the Industrial Commission (A. 237).

c. Petitioner applied for and received leave for duty-related injuries. A form, signed by the Chief City Physician and dated March 2, 1971, stated that petitioner did not work on March 1, 1971, because of an "*injury on duty* received on March 1, 1971, 2:15 a.m." (emphasis in original). The form had a check in the box next to text stating "injury on duty —deduct from injury leave" (A. 245). This form also contained a handwritten notation at the bottom, which read: "although this officer was 'off duty'—he was in line of duty under circumstances relating to Police duties. J.P." (A. 245). Chief Joseph testified that "J.P." was a member of the Industrial Commission (A. 79).

d. A Board of Inquiry was convened to determine the propriety of petitioner's use of his official side arm. The Board's conclusion, in a letter to petitioner, absolved him from departmental responsibility. It stated that "the discharge of your weapon was proper under the circumstances" (A. 246) and that "your actions were in the line of duty" (A. 247).

3. On June 18, 1974, the jury returned a verdict in favor of respondents. The court's judgment made the following awards: $800,000 in actual and $1,000 in punitive damages to respondent Stengel; $19,000 in actual and $1,000 in punitive damages to the administrator of the estate of Ruff; $9,000 actual and

$1,000 punitive damages to the administrator of the estate of Noe (A. 254-255). Petitioner's motion for judgment notwithstanding the verdict was denied by the district court (A. 259-260).

On appeal, petitioner argued that the evidence is insufficient to support a finding that he was acting under color of law (Pet. App. 24). He argued that as a matter of law an off-duty officer cannot act under color of law (*ibid.*). The court of appeals held that no such *per se* test was appropriate, but that the "nature of the act performed" is the most important consideration in a test considering all of the circumstances (*id.* at 25). The court held that the totality of the evidence, including the requirement that petitioner carry a weapon, the intervention by petitioner in the brawl, the testimony of the Chief of Police that an off-duty officer must take action when witnessing criminal activity, the award of workmen's compensation, and the finding of the Board of Inquiry that petitioner was acting in the line of duty, "abundantly supports the jury's verdict" (*id.* at 26) that petitioner was acting under color of law.[4]

SUMMARY OF ARGUMENT

I

We believe that the writ of certiorari should be dismissed as improvidently granted. The petition for

[4] Other issues decided by the court of appeals, including evidentiary matters, liability, and the amount of damages, are not before this Court.

a writ of certiorari presented the question whether the fact that a police officer was required to carry a gun while off duty was enough, standing by itself, to make every use of that gun action "under color of law." The court of appeals did not adopt such a theory, however; it relied upon the totality of the evidence. The instructions to the jury, to which petitioner's counsel did not object at trial, informed the jury that it could return a verdict against petitioner only if the unlawful acts were done while petitioner was "purporting or pretending to act in the performance of his official duties" (A. 209). Because petitioner cannot now assail the legal standards used by the jury, it would be inappropriate for this Court to consider whatever subtle question may have been lurking in the instructions given. Our review of the record of the case therefore leads us to conclude that it presents "considerations * * * which were not manifest or fully apprehended [by this Court] at the time certiorari was granted" (*Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 559 (Harlan, J., concurring and dissenting)), and we suggest that the writ should be dismissed.

II

If the Court reaches the merits, it should affirm the judgment of the court of appeals. The instructions to the jury were taken almost *verbatim* from the seminal opinions of this Court in *United States* v. *Classic*, 313 U.S. 299, 326, and *Screws* v. *United States*, 325 U.S. 91, 111. They instructed the jury

that petitioner could be acting under "color of law" only if he acted in the course of his official duties. There was abundant evidence from which the jury could have concluded that he so acted. Petitioner testified that he intended to arrest two of the participants in the brawl (A. 173). The Chief of Police testified that petitioner acted pursuant to a departmental regulation requiring officers to respond to criminal activity at all times (A. 77). Petitioner applied for, and received, workmen's compensation on account of injuries incurred, during the brawl, in the course of his employment (A. 224-241). He took injury leave for injuries incurred in the line of duty (A. 245). The police firearms board concluded that petitioner discharged his weapon in the "line of duty" (A. 247). Perhaps other circumstances, such as petitioner's failure to identify himself as a police officer, look the other way. But the evidence must now be evaluated in the light most favorable to respondents, and we submit that it is sufficient to support the jury's verdict.

ARGUMENT

I

The Writ Should Be Dismissed As Improvidently Granted

The petition for a writ of certiorari presented the following question (Pet. 2):

> Does the fact that an off-duty police officer, out of uniform, is required by police department regulation to carry a weapon at all times, establish that any use of that weapon against the person of another, even though the officer is engaged in private conduct at the time, to be an act "under color of law" within the meaning of 42 U.S.C. § 1983?

The petition argued that the courts below relied on the "use of a weapon * * * to raise the inference that the weapon was used under color of law" (Pet. 14-15).

We believe that the question framed by petitioner is not presented by this case. The court of appeals did not state that the city's regulation requiring petitioner to carry a gun was enough by itself to permit an inference that petitioner acted under color of law. It stated (Pet. App. 25):

> There was other evidence which permitted an inference that Belcher, although he overstepped the bounds, intervened in the dispute pursuant to a duty imposed by police department regulations.

The court then referred to much of the evidence summarized previously (see pages 4-5, *supra*), and held that this evidence supported the jury's verdict (Pet. App. 26).

This case, involving only an assault upon a verdict by a jury, presents two possible issues for review here. The first is whether the jury was properly instructed. The second is whether the evidence is sufficient to support a verdict under the instructions given.

1. The district court instructed the jury that it could return a verdict against petitioner only if it found that petitioner acted in the tavern "then and there * * * under color of some state or local law" (A. 209). It amplified this instruction as follows (A. 209-210):

> Acts are done under color of law of a state not only when state officials act within the bounds or limits of their lawful authority, but also when such officers act without and beyond the bounds of their lawful authority.
>
> In order for unlawful acts of an official to be done under color of any law, however, the unlawful acts must be done while the official is purporting or pretending to act in the performance of his official duties. That is to say, the unlawful acts must consist in an abuse or misuse of power which is possessed by the official only because he is an official, and the unlawful acts must be of such a nature and be committed under such circumstances that they would not have occurred but for the fact that the person committing them was an official purporting to exercise his official powers.
>
> As you will note, the Federal statute which the Defendant is alleged to have violated covers not only acts done by an official under color of any state law but also acts done by an official under color of any ordinance or regulation of a municipality of a state, as well as acts done by an official under color of any regulation issued by a municipal official.
>
> The manner in which Defendant Belcher may have acted under color of state law was that he carried a gun, a side arm, while off duty. The reason he carried a weapon is because of a police regulation issued by the Chief of Police of the Columbus Police Department which reads in part as follows:
>
> "Members of the Division of Police while off duty shall carry the weapon and ammunition issued to them:
>
> One: Carrying a personal weapon off duty. Members of the Division of Police desiring to carry a personal handgun instead of their issued revolver, shall request permission through the Police Range Officer."

For the reasons discussed at pages 14-18, *infra*, we submit that this instruction, taken as a whole,[5] properly apprised the jury of the meaning of "under color of law." It instructed the jury that it could not return a verdict against petitioner unless it found that his official position was a *sine qua non* of the injury.

Petitioner now appears to object to the last portion of this charge (Br. 10-11, 17), which informed the jury that petitioner "may have" acted under color of law by carrying a side arm while off duty. That arguably ambiguous portion of the charge cannot realistically be isolated from the remainder, which was a model instruction in most respects. But the

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[5] Even in criminal cases, a challenged portion of the instructions is to be judged in the context of the overall charge. See *United States* v. *Park*, 421 U.S. 658, 674-676; *Cupp* v. *Naughten*, 414 U.S. 141, 146-147; *Boyd* v. *United States*, 271 U.S. 104, 107-108.

more serious problem with petitioner's position is that he did not object to the instructions at the time of trial. When asked by the court whether he had any objections to the proposed instructions, petitioner's attorney responded (Tr. 784-785): "No objections to the entire charge of the Court." This was consistent with petitioner's trial strategy, which involved persuading the jury that petitioner acted reasonably under the circumstances, including his duties as an officer. Thus, during argument on petitioner's motion for a directed verdict, petitioner's counsel stated (A. 199): "Your Honor, it is my position that [petitioner] was acting in line of duty under color of law as a policeman of the City of Columbus." Counsel went on to explain petitioner's theory of the case (*ibid.*):

> It is our belief first and foremost that Officer Raymond Belcher at that time was defending himself when he considered himself to be in grave, serious danger of great bodily harm and/or death as a result of what was being done to him.
>
> It is only in the alternative, or in addition thereto, that we would argue that the force was used pursuant to the actions of a police officer who was a witness to a crime going on in his presence and was acting as a police officer.

Accordingly, petitioner cannot now object to the instructions to the jury. "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to

consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Fed. R. Civ. P. 51. See also *Boyd* v. *United States*, 271 U.S. 104, 108; *Stein* v. *New York*, 346 U.S. 156, 173.

2. Because petitioner cannot now attack the instructions to the jury, the only line of argument properly available to him is that the evidence is not sufficient to support a verdict returned under the instructions given. That is ordinarily not a question warranting review by this Court, for it does not call upon the Court to consider whether the legal standards upon which the charge was based were correct. Because petitioner did not object to the charge, the legal standards governing this case must be accepted as given. Moreover, for the reasons set out at pages 18-21, *infra*, we submit that the evidence was sufficient to support the verdict under any reasonable view of the law.[6]

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[6] The only question presented in the petition dealt with whether petitioner acted under color of law. There is no claim before the Court that respondents failed to establish any of the other prerequisites to liability under Section 1983 (*e.g.*, "citizen of the United States or other person within the jurisdiction thereof * * *," "deprivation of any rights, privileges, or immunities secured by the Constitution * * *)." For example, petitioner's actions indisputably deprived two people of "life," and there is no claim that petitioner's infliction of injury upon Stengel did not deprive him of "life, liberty, or property" within the meaning of the Due Process Clause of the Fourteenth Amendment. Nor, in our view, could it persuasively be argued that either the federal government under the Fifth Amendment or the States under the Fourteenth are free intentionally to inflict such bodily injury

Our review of the record in this case therefore leads us to conclude that it presents "considerations * * * which were not manifest or fully apprehended [by this Court] at the time certiorari was granted" (*Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 559 (Harlan, J., concurring and dissenting)). We suggest that the writ be dismissed as improvidently granted. See, *e.g.*, *Duncan* v. *Tennessee*, 405 U.S. 127; *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183; *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74-75.

II

The Evidence Is Sufficient To Support The Jury's Verdict

Petitioner argues that no evidence presented to the jury indicates that he acted under color of law (Br. 18). We submit, to the contrary, that the verdict of the jury is supported by the weight of the evidence. If the Court reaches the merits of this case, therefore, it should affirm the judgment of the court of appeals.

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without observing due process safeguards (if, indeed, the intentional infliction of such injury would be permissible at all under the Eighth and Fourteenth Amendments). Compare, *e.g.*, *Rochin* v. *California*, 342 U.S. 165, and *Schmerber* v. *California*, 384 U.S. 757, 766-772, with *Paul* v. *Davis*, No. 74-981, decided March 23, 1976. See also, the reference to "life or limb" in the Fifth Amendment's double jeopardy clause.

A. *The District Court Correctly Instructed The Jury That Action Is "Under Color Of Law" If It Purports To Be An Exercise Of The Official Authority Of The Wrongdoer*

The instructions to the jury in this case were taken almost *verbatim* from the seminal opinions of this court in *United States* v. *Classic*, 313 U.S. 299, and *Screws* v. *United States*, 325 U.S. 91. The Court held in *Classic*, *supra*, 313 U.S. at 326, that:

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.

Screws observed that there may be instances in which actions of public officers remain personal actions. It adopted the following test to distinguish public from private actions (325 U.S. at 111):

> It is clear that under "color" of law means under "pretense" of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it.

The boundaries marked by *Classic* and *Screws* have repeatedly been reaffirmed. See, *e.g.*, *Williams* v. *United States*, 341 U.S. 97, 99; *Monroe* v. *Pape*, 365 U.S. 167, 187; *United States* v. *Price*, 383 U.S. 787. See also *Watkins* v. *Oaklawn Jockey Club*, 183 F.2d 440, 443 (C.A. 8). And, since these decisions merely construe an Act of Congress, this settled construction should not be disturbed absent the clearest evidence that the Court was wrong. See, *e.g.*, *Runyon* v.

McCrary, No. 75-62, decided June 25, 1976, slip op. 12-13; *Flood* v. *Kuhn*, 407 U.S. 258, 269-285; *Monroe* v. *Pape*, *supra*, 365 U.S. at 184-185.

The tests established in *Classic* and *Screws*, of course, do not give categorical answers to the many questions posed by the varieties of human conduct that may be thought to be "official." See *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144. Courts usually have examined the actions of a police officer against the backdrop of official police conduct to which the actions in question may be related. If the facts show that the action in question was performed in reliance upon, or was otherwise closely related to, the duties the officer was called upon to perform in an official capacity, the cases allow a jury to conclude that it was taken under "color of law," even if the specific action flagrantly overstepped the bounds of acceptable police practices.[7]

[7] The Court has held on many occasions that the Fourteenth Amendment was designed not only to overcome unjust state laws, but also to prevent abuse of the State's power. In order to achieve the latter goal, the Amendment must reach official conduct even when it violates state law. See *Ex parte Virginia*, 100 U.S. 339, 346-347; *Home Telephone & Telegraph Co.* v. *City of Los Angeles*, 227 U.S. 278, 287 (The Fourteenth Amendment reaches "the possibility of an abuse by a state officer or representative of the powers possessed * * *. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible *or is efficiently aided* by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant * * *" (emphasis added).) This is the theory that informed *Screws*, *Classic*, *Monroe*, *Price* and similar cases.

It also accounts for the "private guard" cases. Where a police officer who is also working as a private guard takes action which is consistent with, and related to, a duty imposed on a police officer by state or local law, these actions are under color of law even if the officer claims to have acted in a purely private capacity. In *Williams* v. *United States*, *supra*, a lumber yard guard held a special police officer's card issued by the City of Miami. The Court held that the actions of the guard, beating confessions out of four suspected thieves, were taken under color of law. In *Griffin* v. *Maryland*, 378 U.S. 130, a deputy sheriff was employed as a guard at an amusement park; his actions in arresting individuals for trespassing, transporting them to the police station and applying for an arrest warrant, were held to be action of the State. "If an individual is possessed of state authority and purports to act under that authority, his action is state action." 378 U.S. at 135. Similarly in *Crews* v. *United States*, 160 F.2d 746, 750 (C.A. 5), an off-duty constable who beat and caused the death of an individual after taking him "into custody in a manner which appears on its face to be in the exercise of authority of law," was found to be acting under color of law. See also *Catlette* v. *United States*, 132 F.2d 902 (C.A. 4); *United States* v. *Price*, *supra*.

On the other hand, in *Watkins* v. *Oaklawn Jockey Club*, *supra*, 183 F.2d at 443, police officers working as race-track guards ejected a non-abusive patron from the track on the order of the track owner. The court found that this action was not taken under color of law, noting that the ejectment was in no way related to official police duty. In *Johnson* v. *Hackett*, 284 F. Supp. 933 (E.D. Pa.), the court found that an offer by a police officer to fight another individual after hours, and his calling that individual abusive names, were not actions under color of law because they were not related to official police duty. Similarly, in *Robinson* v. *Davis*, 447

The district court's instructions to the jury informed it that it must find that petitioner was "purporting or pretending to act in the performance of his official duties" (A. 209). The court of appeals analyzed the entire "nature of the act performed" (Pet. App. 25) and the surrounding circumstances to determine whether petitioner had acted under color of law. Petitioner himself advances the same standard (Br. 17). There was therefore no error in the charge to the jury or in the legal standard applied by the court of appeals.[8] We now turn to the question

F.2d 753 (C.A. 4), certiorari denied, 405 U.S. 979, the court held that the actions of college security guards who told certain students to report to the Dean did not, simply because the guards who were working for the college were also police officers, amount to state action. The court found that the action taken was consistent with the position of college guards and was not related to a duty imposed on a police officer by state law.

[8] Petitioner argues (Br. 10-11, 17) that a portion of the charge to the jury allowed it to infer that petitioner was acting under color of law solely from the fact that he was required to carry a gun while off duty. We do not agree with petitioner that the instruction had this effect. It immediately followed the court's comprehensive and accurate statement of the law. The language of the now-contested instruction stated only that petitioner "may have" acted under color of law in carrying the side arm. Read in context, this portion of the instruction simply drew the jury's attention to one factor to be considered. Although the instruction arguably is ambiguous on this point, and although it undoubtedly would have been better for the court to enumerate other factors that the jury should consider, petitioner, who did not object to the instructions, cannot now capitalize upon the alleged ambiguity omissions in this civil case. *Indianapolis and St. Louis R.R. Co.* v. *Horst*, 93 U.S. 291.

whether the evidence supports the jury's conclusion that petitioner's actions were related to official police activity.

B. *The Circumstances Indicate That Petitioner's Status As A Police Officer Was Intimately Related To His Deeds*

The question whether an official's actions were taken under color of law is properly to be determined by the jury. *Williams* v. *United States*, *supra*, 341 U.S. at 99. Petitioner's contention that the evidence introduced "did not support the jury's determination, implicit in its verdict, that the Petitioner had acted under color of law" (Br. 12) therefore requires a review of the evidence presented. The jury's verdict must be sustained if, taking the evidence most favorably to respondents, "there is an evidentiary basis for the jury's verdict." *Lavender* v. *Kurn*, 327 U.S. 645, 653; *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U.S. 108. We submit that the evidence clearly is sufficient to sustain the verdict.

Although petitioner did not identify himself during the altercation as a police officer, he testified that "I made up my mind that I was absolutely one way or the other going to arrest all three men—correction, at least two of these men" (A. 173). Testimony was introduced that petitioner arose from his table with his can of police-issue gas upraised (A. 177) and that he interceded in the dispute of his own volition (A. 45-46). The jury could have concluded that petitioner joined the fracas as a police officer. He had a duty, described by his Chief of Police, to respond to

criminal activity at all times (A. 76).[9] Several official and unofficial findings placed in evidence also suggested that petitioner acted in an official capacity. The Chief of Police testified that, in his opinion, petitioner acted pursuant to his official police duty (A. 77). Petitioner applied for, and received, workmen's compensation on account of injuries suffered during employment (A. 224-241). He took injury leave for injuries incurred in the line of duty (A. 245). The police firearms board concluded that petitioner's actions were in the "line of duty" (A. 247).[10]

Petitioner asserts that, because he did not identify himself as a police officer, he could not have been engaged in official conduct (Br. 18-19). Although an oral warning by an officer to a suspect is undoubtedly an important piece of evidence that could lead a jury to believe that the officer was acting, or purporting to act, in his official capacity (*Koehler* v. *United States*, 189 F.2d 711 (C.A. 5), certiorari denied, 342 U.S. 852), we cannot agree with petitioner's attempt to

[9] This duty was the basis for the regulation requiring off-duty officers to carry a weapon. Cf. Pet. Br. 23. We therefore see nothing objectionable about holding petitioner to account for his use of the weapon in circumstances such as those here or allowing such use to give rise to an inference that he acted under color of law.

[10] Petitioner argues that this evidence was offered during the conspiracy portion of the trial and is therefore not "relevant" to a determination whether his actions were under color of law (Br. 20). But the evidence was not offered or admitted under any theory that would limit its use in this fashion, and we know of none. Compare Fed. R. Evid. 401 and 402 with Fed. R. Evid. 105.

make this a litmus paper test. A disclaimer of official status before taking action does not, by itself, turn public action into private action. *Catlette* v. *United States*, 132 F.2d 902 (C.A. 4). A failure to identify oneself as a police officer may be a relevant factor, even a dispositive factor in some cases, but it cannot become a device by which a police officer can exempt himself from the strictures of 18 U.S.C. 242 or absolve himself of liability under 42 U.S.C. 1983. The officer's actions, of which a spoken identification, lack of identification or disclaimer are part, must be considered objectively against the backdrop of the possible official duties to which they may relate. In this case, petitioner's intervention in the altercation was found, based on substantial evidence, to have been undertaken pursuant to a police regulation requiring just such action. The uncontroverted fact that he failed to identify himself as a police officer is clearly relevant evidence, but is not enough to rebut as a matter of law the other evidence considered by the jury.[11]

[11] Similarly, the determination does not turn on the presence or absence of a police uniform. Compare *Robinson* v. *Davis*, 447 F.2d 753 (C.A. 4), certiorari denied, 405 U.S. 979, and *Johnson* v. *Hackett*, 284 F. Supp. 933 (E.D. Pa.) (officer in uniform but not acting under color of law), with *Price*, *supra*, *Koehler*, *supra*, and *Crews*, *supra* (officer not in uniform, but actions were found to be under color of law).

Petitioner also suggests that the "color of law" standard should turn on whether the victim understood the actor to be a police officer (Br. 19). Although this, too, is a relevant factor for the judge or jury to consider (*Crews*, *supra*, 160 F.2d at 750), it is quite subjective in nature and would lend itself

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted. If the Court decides the case on the merits, it should affirm the judgment of the court of appeals.

Respectfully submitted.

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to many after-the-fact revisions by witnesses. And it might be impossible of application where, as here, a victim is deceased.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-823

RAYMOND BELCHER,

Petitioner,

—v.—

CASEY D. STENGEL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF OHIO FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF OHIO FOR LEAVE TO FILE BRIEF AMICI CURIAE

The American Civil Liberties Union and The American Civil Liberties Union of Ohio respectfully move, pursuant to Rule 42 of this Court's rules, to file the within brief amici curiae. Counsel for the respondents has consented to the filing of this brief; counsel for the petitioner has refused consent.

The American Civil Liberties Union and its affiliate, the American Civil Liberties Union of Ohio, request leave to file this brief as amici curiae. Both organizations are organized for the primary purpose of protecting the civil rights and liberties of Americans. The American Civil Liberties Union has been in existence since 1920, and its affiliate, the American Civil Liberties Union of Ohio has been in existence since 1953. One of the constant concerns of both organizations has been the need to provide adequate legal mechanisms to protect against, and remedy, violations of constitutionally protected rights. They have been particularly concerned that recent decisions of the Court have hampered the historic role of the United States District Courts in implementing remedies for violations of constitutional rights. See, e.g., Imbler v. Pachtman, ___ U.S. ___ (1976); Rizzo v. Goode, ___ U.S. ___ (1976); Paul v. Davis, ___ U.S. ___ (1976); Hicks v. Miranda, 422 U.S. 332 (1975). One of our concerns is that this case, in which the lower courts followed settled law in concluding that a police officer, off-duty but acting because of, and under protection of, his office, unjustifiably shot three persons, not become a vehicle for the overruling or narrowing of Monroe v. Pape, 365 U.S. 167 (1961).

Respectfully submitted,

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IN THE SUPREME COURT OF
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Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION
and
AMERICAN CIVIL LIBERTIES UNION OF OHIO
AS AMICI CURIAE

Interest of Amici Curiae

The interest of amici appears from the foregoing motion.

Introduction

This case raises no novel questions of law. Both Judge Weick, writing for the Court of Appeals, and Judge Kinneary, the trial judge, dealt with the issue of whether the Petitioner, Officer Belcher, acted under color of state law, according to settled precedents, breaking no new ground. Analytically, the "color of state law" issue at this stage of the litigation involves two questions - the sufficiency of the evidence to support the verdict and the propriety of Judge Kinneary's charge to the jury. We will try to demonstrate below that respondent is correct in arguing that the District Court and Court of Appeals committed no error on these points.

We perceive no way for the petitioner to win this case on the basis of settled law and are concerned that the Court might decide to radically change the presently settled understanding of the phrase, "under color of state law." It is one of the primary reasons of this brief to set forth the reasons why the Court should not do so.

With respondents, we do not see the

issue in this case as whether the fact that Officer Belcher shot with a gun he was required by Police Department regulations to have with him makes otherwise private conduct state action.

Moreover, we cannot agree with petitioner that the decisions below "stultify proper law enforcement" or "dampen vigorous law enforcement" (petitioner's brief at p. 23). Petitioner does not and cannot argue here that the jury acted improperly when it rejected his story that he acted in self defense and, instead, concluded that he used excessive force when he shot his gun, killing Noe and Ruff and injuring Stengel. Ultimately, the sole issue here is whether respondents have a remedy for petitioner's misconduct under federal law or simply under state law.

Proceedings Below

Judge Kinneary handled the question of whether Officer Belcher acted under color of state law when he shot Respondent Stengel and Decedents Noe and Ruff in the most cautious possible manner. The complaint alleged that Belcher was "acting under color of the statutes, ordinances, regulations, customs and usages of the State of Ohio, County of Franklin and the City of Columbus." Complaint ¶6, App. p. 9. Belcher moved to dismiss, claiming that "since he

was not technically on duty when the assault occurred he could not have been acting under color of state law." App. p. 31. The order denying the motion pointed out that the facts were not yet in issue, and the allegations were adequate. Ibid.

At trial, the posture of defense counsel, who was also City Attorney, was that Belcher had acted under color of state law. This was clear from a colloquy which took place when he argued for a directed verdict after plaintiffs' case in chief.

"The Court: . . . .

> Is there any question in this case, under this record so far, that Officer Raymond Belcher was acting under color of law?

Mr. Hughes:

> Your Honor, it is my position that he was acting in line of duty under color of law as a policeman of the City of Columbus." App. p. 199.

Indeed, one of the arguments urged by defense counsel, in arguing for a directed verdict on the ground of insufficient evidence of excessive force was that "the force was used pursuant to the actions of a police officer who was a witness to a crime going on in his presence and was acting as a police officer." App. p. 199.

Nevertheless, Judge Kinneary charged the jury that, in addition to proving a deprivation of a federal constitutional right, plaintiffs had the burden of proving that Belcher "acted under color of some state or local law." App. p. 208. He carefully defined the term, "color of law", for the jury, pointing out that, while it encompassed acts within and without lawful authority, the unlawful acts "must be done while the official is purporting or pretending to act in the performance of his official duties." App. p. 209.

Moreover, while Judge Kinneary instructed the jury that "the manner in which Defendant Belcher may have acted under color of state law was that he carried a gun [which police department regulations required him to carry]," he neither told the jury that that fact required them to find "color of law" nor that it was the only evidence on which they could base such a conclusion. The jury charge was neither objectionable nor objected to. Cf. Rule 51, Fed. R. Civ. P.

The Evidence

As suggested above, defense counsel for Officer Belcher, in addition to accepting the jury charge on the color of law issue, likewise failed to contest the sufficiency of the evidence on that point. App. p. 199.

In fact, there was ample evidence on which the jury could place its verdict.

As respondents' brief will point out in greater detail, there was ample evidence for the jury to find that Belcher intervened in the dispute going on in the bar, grabbing one of the participants without announcing himself as a police officer, and that he started shooting his gun when he could not have believed it necessary for self-defense, going so far as to pursue and shoot one of the victims outside the bar.

On the color of law issue, the jury could have relied on the following evidence to find that Belcher was motivated to act by his conception that his official position required him to act, a view corroborated by his superiors' conception of the obligations of Belcher's job.

1. Belcher's own testimony as to his motivation for involving himself in the dispute. At trial, he testified that, after watching the altercation, "...I made up my mind that I was absolutely one way or the other going to arrest all three men - correction, at least two of these men." Tr. p. 648. Thereafter, according to Belcher's testimony, he took out his police-issue tear gas cannister, tr. p. 650, and started for the door to call the police. tr. p. 649.

2. Belcher's own conduct subsequent to the event in which he characterized his action as occurring in the line of duty. This includes the filing of a Workmen's Compensation Claim (which was allowed) for aggravation of a back injury during the incident. App. p. 224, et seq. Belcher filed the claim under an Ohio Statute limiting workmen's compensation to injuries occurring "in the course of employment." Ohio Rev. Code §4123.54.

3. Belcher's belief that he acted because of his official position was corroborated by his superiors' conception of his job requirements. The chief of police testified that all Columbus police officers were "expected to take action in any type of police or criminal activity 24 hours a day...[and] would be subject to discipline if they didn't take action." App. p. 76. That view was corroborated by the Chief's immediate superior, the Safety Director, who, after reviewing the conclusions of the police department, likewise concluded that the conduct had occurred "in the line of duty." App. p. 247.

4. The objective fact of Belcher's possession and use of a gun required to be carried by police department regulations is most significant in connection with the above-quoted reason for the regulation. It exists because Columbus police officers are required, on or off duty, to take action as police

when they see "police or criminal activity." App. p. 76.

5. At trial (and here) Belcher was represented by the Columbus City Attorney, who was empowered by Section 67 of the Columbus City Charter to be the "attorney and counsel...for all officers...[of the city] in matters relating to their official duties." The jury was aware of that fact and, in addition, listened to the arguments the City Attorney made as defense counsel. Throughout the trial, he referred to petitioner as Officer Belcher. In closing argument, he argued that, although Belcher had not identified himself as a police officer, Noe, Ruff and Stengel knew he was one and knew that, because of it, "Police Officer Belcher had to do something." Tr. p. 740. The heart of defense counsel's closing argument was,

> "...it is immaterial to this case as to whether [Belcher] made a right decision; whether or not in his duty as a police officer to restore peace, whether he should have stood up and said I am a policeman,
>
> ... He was a policeman. He had an obligation to do something. He couldn't just sit there while a man was being stomped by two young gentlemen next to him. He had that obligation and he discharged that obligation***" Tr. 742.

Petitioner argues that "the more logical inference to be drawn" from his failure to identify himself was that he did "not intend to act as a police officer." Petitioner's brief, p. 19. From the jury's point of view, however, given the evidence just summarized and the calculated defense trial strategy to clothe Belcher's conduct with the sanction of his office, the jury had little choice but to find that he was "purporting or pretending to act in the performance of his official duties." App. p. 209.

The Meaning of "Under Color of State Law"

As the Court of Appeals pointed out, the jury could easily have found that Belcher abused the authority of his official position. It is the primary purpose of this brief to demonstrate that abuse of authority is and should be conduct under color of state law within the meaning of 42 U.S.C. §1983. Petitioner's brief articulates no other standard, but, since the Court does not ordinarily grant the writ of certiorari to review the sufficiency of evidence, we believe a further analysis is proper.

As the Court is aware, although what is presently §1983 came into being as Section One of the Act of April 20, 1871,

17 Stat. 13., there were no interpretations pertinent to the issue presently being considered in this Court until the 1930's. 1/

The first significant interpretation was in Hague v. C.I.O., 307 U.S. 496 (1939). We believe it set the Court on the correct course of holding that what is now 42 U.S.C. §1983 2/ protects persons against deprivations of rights, privileges and immunities secured by the United States Constitution and laws both by official conduct sanctioned by state law and that which is in violation of state law.

Hague v. C.I.O. was an action in equity under §1983 seeking to enjoin municipal officials from violating constitutional rights. Some of the conduct complained of was claimed to be justified by municipal

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1/ The Civil Rights Cases, 109 U.S. 3 (1883) have no bearing on the present case. There, the Court merely held "state action" to be required under the 14th Amendment, without giving content to the concept as articulated in the Statute under consideration here.

2/ The earlier form was R.S. 1979, but for consistency we will refer to the Section before the Court by its present codification.

ordinances held by the Court to be unconstitutional, and other aspects, such as unlawful searches of persons and seizures of printed material, 307 U.S. at 502, were not. Five members of the Court concurred in the conclusion that the conduct charged was in violation of the constitution and voted to affirm the decree as modified. No distinction was made about the extent to which conduct of officials was authorized by or in violation of local law or whether the local ordinances complied with state law, and only in the lone dissent of Mr. Justice McReynolds was there a suggestion that notions of federalism had any applicability to the plaintiffs' right to relief.

Hague was followed quickly by United States v. Classic, 313 U.S. 299 (1941), which involved a criminal charge under what is now 18 U.S.C. §242, the criminal analogue of §1983,3/ that Louisiana election offi-

3/ This section will be referred to by its modern codification. 18 U.S.C. §242 was then codified as §20 of the Criminal Code, 18 U.S.C. §52, R.S. §5510. It derives from §2 of the Civil Rights Act of 1866, 14 Stat. 27, was reenacted and amended by §17 of the Act of May 31, 1870, 16 Stat. 144, and amended again in the course of the 1874 codification to assume its present form. Although §242 differs from §1983 in the presence of the word "willfully," its interest protected-

(continued next page)

cials had tampered with ballots in a Congressional primary election.

Without dissent on that point 4/ the Court found adequate state action despite the fact that the conduct charged violated state, as well as federal, law. Mr. Justice

(continued)
"rights, privileges and immunities secured by the Constitution and laws of the United States" - is, in this respect, identical to that of §1983, and its state action phrase - "under color of any law, statute, ordinance, regulation, or custom" - is almost identical. There has never been any serious claim that the concept the 1871 Congress had of "state action" in adopting §1983 differed from the ones its predecessors had in adopting 18 U.S.C. §242. As a result, interpretations of "state action" under one have been treated as controlling on the other. See Monroe v. Pape, 365 U.S. 167, 185 (majority opinion), 212 (dissenting opinion)(1961).

4/ Mr. Justice Douglas wrote a dissenting opinion, concurred in by Mr. Justice Black and Mr. Justice Murphy, urging simply that the Court's interpretation of the act to reach primary elections violated the anti-vagueness values implicit in the rule of strict construction of penal laws.

Stone wrote:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." 313 U.S. 326.

The view that misuse of authority was within the term, "under color of law" was challenged for the first time in Screws v. United States, 325 U.S. 91 (1945), but sustained by a vote of six members of the court. 5/ Justices Roberts, Jackson and Frankfurter, dissenting, argued that §242 reached only conduct authorized by state law, and, therefore, that it should not apply to a sheriff and deputy who beat a prisoner to death, because that conduct violated state law as well.

5/ There was no majority opinion. The plurality opinion, written by Mr. Justice Douglas, covered his analysis of the "color of law" and vagueness issues in the case. Although Justices Rutledge and Murphy disagreed with his analysis of the latter issue, their opinions make it clear that they agreed with his analysis of the "color of law" issue.

The rejection of the Frankfurter interpretation continued in Williams v. United States, 341 U.S. 97 (1951), another prosecution under 18 U.S.C. §242, in which the conduct - beating a confession out of a suspect - was an unauthorized violation of state, as well as federal, law. Williams is significant in another respect: the Court found adequate evidence that the defendant, a private detective, acted under color of state law, in the fact that he held a special police officer's card issued by the City of Miami, Florida which granted him policemen's powers. The significant fact was that Williams was not a private interloper but was asserting the authority granted to him by law. 341 U.S. at 100. On the basis of Belcher's testimony and trial defense, his situation is strikingly like that of Williams.

Monroe v. Pape, 365 U.S. 167 (1961) brought about this Court's application to §1983 of the foregoing principles over the lone dissent of Mr. Justice Frankfurter. The Court's opinion extensively surveyed the legislative history of §1983 and concluded that it supported the Classic "misuse of authority" interpretation of the term, "under color of state law."

Independent examination of the legislative history of the Ku Klux Klan Act of April 20, 1871 supports that conclusion. The President's message which led to the

legislation articulated the primary problem as the taking of life and other acts of violence in the southern states. Cong. Globe, 42nd Cong., 1st Sess.244 (1871). That condition of affairs was documented in the Senate Judiciary Committee's report, and extensively discussed in the Congress. See, e.g. Cong. Globe, 42nd Cong., 1st Sess, 152-156 (Remarks of Senator Sherman). The perceived problem was not only the activities of the Klan but the complicity of state officials, such as sheriffs, in its conduct. See, e.g., Cong. Globe, 42nd Cong., 1st Sess. app. 78, 80 (remarks of Rep. Perry), 365 (remarks of Rep. Arthur), 609 (remarks of Rep. Pool), 702 (remarks of Rep. Edmunds). Moreover, the Congress perceived not only that the Klan was protected by local law enforcement authorities but that they participated in its activities. See, e.g., Cong. Globe, 42nd Cong., 1st Sess. app. 309-310, 315 (remarks of Rep. Burchard), 442 (remarks of Rep. Butler), 79 (remarks of Rep. Perry).

This history demonstrates that the 1871 Congressional majority sought to reach both private conspiratorial activity (which it covered in section 2 of the Act of April 20, 1871) and misconduct by public officials, covered by Section One of the Act.

Mr. Justice Harlan, joined by Mr. Justice Stewart concurring in the majority's adoption of the misuse of authority standard

indicated that he was less persuaded by the majority's reading of the legislative history than he was by the illogic of the position urged in Mr. Justice Frankfurter's dissent, 365 U.S. at 194, et seq. 6/ He pointed out that it was hardly likely that the 1871 Congress, with its perception of the problem, would have sought to provide a federal remedy and forum against private conspiratorial conduct and against misconduct authorized by state law but not against the unauthorized misconduct of state and local officials. 365 U.S. at 199.

That view, combined with the policy of stare decisis and absence of a distinction between Classic and Screws was the basis for the concurrence. 365 U.S. at 192.

Since Monroe, the misuse of authority standard has been treated as settled law. In Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970), for example, the Court unanim-

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6/ Even under the Frankfurter view that §1983 reaches only misconduct authorized by state law it is not at all clear that this case, with its extensive post hoc ratification of Belcher's conduct by the Columbus Municipal Government, would fall on the wrong side of the line. See, e.g., 365 U.S. at 258-259.

ously agreed with Mr. Justice Harlan's statement that §1983 reaches a police officer's conduct "whether or not the actions of the police were officially authorized, or lawful." 398 U.S. at 152.

Mr. Justice Harlan's opinion in Monroe suggests that principles of stare decisis are particularly important in cases of statutory interpretation where there is an indication of Congressional acceptance of earlier interpretations. 365 U.S. at 192. That principle is particularly applicable to the "misuse of authority" interpretation of §1983 in Monroe and its predecessors. The Monroe decision was, of course, well known. See, e.g., "Justice," 5 United States Commission on Civil Rights (Nov. 1961). In the years immediately following the decision, Congress considered extensive civil rights legislation, passing several civil rights acts, and made no effort to change the settled interpretation of §1983. During that period, this Court and the lower courts decided numerous cases applying §1983 to cases of misconduct of government officials, including the use of excessive force by persons in law enforcement roles. See, e.g., Scheuer v. Rhodes, 416 U.S. 232 (1974); Palmer v. Hall, 517 F.2d 705 (5th Cir. 1975); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973); Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963). The development and meaning of the law was well known to Congress.

Conclusion

This case was properly decided by the lower Courts according to settled principles of law. Rather than changing those settled principles, this Court should adhere to them in the recognition that the implementation of the decision made by the 1871 Congress to provide a federal remedy and a federal forum to protect rights under the federal constitution and laws has been a healthy component of our federalism.

Respectfully submitted,

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